IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	**No. SC84515**
	)	
	)	
DEANDRA M. BUCHANAN,	)	
	)	
Appellant.	)	

Appeal to the MISSOURI SUPREME COURT

From the Circuit Court of BOONE, COUNTY

Thirteenth Judicial Circuit, the Honorable Gene Hamilton, JUDGE

APPELLANT'S OPENING BRIEF

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[1] This Index contains hyperlinks to each section of Appellant's Opening Brief.

Appendix (bound separately)

[2] This link will open the Trial Transcript, which is stored on CD. NOTE: Appellant has modified the Transcript's Index to include hyperlinks and combined the entire transcript into a single file. Curiously, the pagination does not match the printed transcript.

Authorities[3]

***CASES*:**

[3] For this Court's convenience, undersigned counsel is filing a CD that contains this brief, the Trial Transcript and each case, statute, rule and instruction stored in MicrosoftWord 2002 documents. The cases, statutes and rules have been downloaded from Westlaw and contain Westlaw hyperlinks. Click here to sign on to Westlaw. Undersigned counsel has filed 8 such CDs with this Court (1 for the file and 1 for each member of the Court). He has provided the State with a CD as well.

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

Jurisdiction

Deandra M. Buchanan, appellant, was tried in Boone County by a Henry County jury. The jury, which did not represent a fair cross-section of that community, found Deandra guilty of three counts of first-degree murder and one count of first-degree assault. The jury, however, could not "decide or agree upon punishment" for any of the three counts of murder – it was not asked to recommend a sentence for assault because Deandra has prior misdemeanor convictions. Judge Hamilton found that (1) the State had proved each statutory aggravator beyond a reasonable doubt, (2) the facts and circumstances in aggravation warrant death, (3) the facts and circumstances in mitigation did not outweigh those in aggravation and (4) death was the appropriate sentence for each count of murder. On April 22, 2002, Judge Hamilton sentenced Deandra to death for each murder and life for assault. Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art. V, §3, Mo. Const. (as amended 1982).

Facts

Deandra was charged in Boone County Circuit Court with three counts of first-degree murder and one count of first-degree assault (L.F. 27-28).[4] He exercised his right to a jury trial, but sought a change of venue due to extensive publicity in Columbia (L.F. 11-19, 32-47, 49-64). The State agreed to pick the jury in Henry County (Tr. 2-4).

Henry County's Jury Selection Procedure

In September 1992, the Henry County Board of Jury Commissioners met to address its method for selecting jurors for petit jury service (Ex. 1). To create its master list of potential jurors, the Board had to choose which public record(s) it would consult. §494.410. The Department of Revenue makes such lists readily available, so the Board decided to use DOR's list of "licensed Missouri drivers over twenty years of age" (Ex. 1; Tr. 376). The Board did not consider that this list would exclude from jury service all persons with disabilities that preclude them from driving, e.g., individuals who are legally blind (Tr. 377). Blind persons are eligible for jury service, but Henry County will not select them (Tr. 377). The Board still uses this procedure (Tr. 357).

Henry County has 15,988 residents over age 20 (Ex. A). DOR, however, sends Henry County a list that contains 20,009 names (Tr. 352). The County uses these 20,009 names as its master jury list (Tr. 336-337, 352, 365-367). While this list contains copious

[4] The record consists of the legal file (L.F.), transcript (Tr.) and exhibits (Ex.). Click here to launch the Trial Transcript.

names of persons not qualified to serve on a Henry County jury, the County never deletes any names it (Tr. 341, 369, 371).

Henry County Circuit Court has three terms each year (Tr. 337). To prepare for each term, the County uses a computer program to draw 500 names at random from the master list of 20,009 names provided by DOR (Tr. 338-339). Because disqualified names are never deleted from that list, the list of 500 names must be cleaned up each term (Tr. 370-371). The list of 500 quickly can become inadequate. In this case, removing the disqualified names from the list of 500 left Henry County with only 106 potential jurors (Tr. 350, 359). Sensing that this would not produce a jury in Deandra's case, Henry County Presiding Judge William Roberts ordered a "special panel" of 125 names to be drawn at random from DOR's list of 20,009 names (Tr. 359-360).

Once Henry County had a pool of qualified jurors, it had to set about selecting which ones to summons for Deandra's trial. Judge Roberts has delegated authority to the Circuit Clerk's office to excuse jurors who report having, e.g., the flu, vomiting or a broken leg (Tr. 362). Judge Robert simply leaves it to the "sound judgment" of the Clerk's Office to excuse "juror[s] [who] should not be here or cannot be here for good reason, illness…" (Tr. 364). The Clerk's Office also customarily skips the names of anyone who it knows to have vacation plans (Tr. 349-350). Before summoning jurors for Deandra's trial, the Clerk removed "at least one person" who had vacation plans (Tr. 351-352). The Clerk simply skipped that person (Tr. 351-352).

From the 106 names remaining on the initial list of 500, Henry County called 83 for voir dire (L.F. 319-320; Tr. 402). This yielded nine final jurors (L.F. 319-320). From

the "special panel" of 125 names, Henry County called 33 for voir dire (L.F. 321; Tr. 1005). This yielded the remaining three jurors and the two alternates (L.F. 321).

Death Qualifying the Jury

Panel 1: Juror Cassandra Tucker was one of two African-Americans on Deandra's venire (Tr. 700-701). The State agreed that Ms. Tucker "[e]stablished" that she believes death to be an appropriate punishment for first-degree murder (Tr. 679-681). She would consider death, and she could impose it (Tr. 621-622, 681-682). She simply would not want to serve as foreperson (Tr.620-622, 681). The State moved to strike her for cause, and the trial court did so, over Deandra's objection (Tr. 701-705).

Panel 2: Juror Gary Waggoner could consider life without parole and death, but he would expect the defense to prove that life was an appropriate punishment (Tr. 766, 784). He said that he would not require the defense to present any evidence and that he would not hold it against Deandra if the defense presented nothing (Tr. 767, 789). When Juror Hawkins contended that it would be a "waste of time" if the defense did nothing, Juror Waggoner elaborated: "So if the defense did absolutely nothing, if the prosecutor convinced me that this person was – had did the crime, it would be death. I would not consider life without parole and put the expense on the taxpayers." (Tr. 790). Juror Hawkins replied, "Right," and the court struck him for cause (Tr. 801-802). The court, however, refused to strike Juror Waggoner (Tr. 798-799). Waggoner sat on Deandra's jury (L.F. 319)

The Trial

Just before 9:00 p.m. on November 7, 2000, reports that shots had been fired at 512 Mary Street "pulled [Columbia] police away from election returns" (L.F. 46; Tr. 1253, 1276, 1293, 1451-1452). When police arrived, Angela Brown was lying wounded on the ground west of the house; Juanita Hoffman was walking injured around the house to the driveway; and William Jefferson was lying, dead, on the kitchen floor in the house (Tr. 1257-1259, 1279-1280, 1282, 1287). Each died from a single shotgun wound (Tr. 1397-1399, 1593-1594, 1596, 1598-1600). Meanwhile, a few blocks west, Jerry Key had offered Deandra a ride, and moments later, Jerry was leaping from his car after being shot in the chest by Deandra (Tr. 1266, 1295-1296, 1381, 1385-1386, 1406-1421, 1427-1433, 1438-1439, 1455-1455-1457, 1468).

Within minutes, Deandra was arrested, his shotgun was recovered and he was placed in a patrol car (Tr. 1392-1393, 1461-1468, 1473-1474, 1476, 1930). He was highly agitated, butting his head against the window (Tr. 1466, 1909, 1915, 1932). He chattered almost non-stop, occasionally "running out of breath" (Tr. 1466, 1474, 1915-1917, 1930-1931). He talked very loudly and very quickly, saying "They're out to get me." (Tr. 1466, 1474, 1915-1916). He said he killed them after they "circled him up" (Tr. 1915-1916). At one point, he glanced over his shoulder and saw a crowd gathering behind the patrol car (Tr. 1917). When he voiced concern that police could not keep him safe, they transported him to the station (Tr. 1918).

At the station, Detectives White and Liebhart met with Deandra (Tr. 1480). First, White sat down with Deandra for an un-Mirandized get-to-know-each-other chat that lasted about 40 minutes (Tr. 1482, 1484, 1516, 1520). White then advised Deandra of his

rights and took his statement (Tr. 1485-1486). Deandra admitted to having shot William (his stepfather), Juanita (his aunt), and Angela (his girlfriend) (Tr. 1492-1493, 1496-1497, 1499-1500). He told White that these shootings had stemmed from an incident seven years earlier in East St. Louis, when he had shot his drug partner in the leg (Tr. 1487). Ever since, Deandra had felt like this partner was out to kill him, and he came to believe that Angela was in cahoots with the partner from East St. Louis (Tr. 1487-1488). On November 7, 2000, Deandra felt like William, Juanita and Angela were all "ganging up on him" (Tr. 1489-1492). When Jerry offered him a ride, he accepted it, but then became suspicious and shot him (Tr. 1501-1503).

White then conferred with Liebhart, and they decided to try to get a videotaped statement (Tr. 1505-1506). When Liebhart began re-Mirandizing Deandra, Deandra stated, "I don't make no statements." (Ex. 45; Tr. 1512). Ultimately, Deandra explained that he was not going to sign anything (Ex. 45). He then reiterated his prior statement (Ex. 45).

Two weeks later, Deandra told Dr. Lipman, "[T]here's too many coincidences that show me that people are plotting like my stepfather, my girlfriend and my aunt always ending up meeting at the same place … the doctor's office or the same court date … too many coincidences, they were meeting to plot." (Tr. 2149-2150). Deandra "believed members of his family had been replaced by look-alikes." (Tr. 2150). He asked Dr. Lipman if DNA tests could be conducted on William, Angela and Juanita "to ensure that they were actually the real people…" (Tr. 2150).

The defense did not contest Deandra's actions, but rather, challenged his mental state (Tr. 1241, 1250). It retained Dr. Poch to evaluate Deandra (Tr. 2095). Dr. Poch learned that when Deandra was about 10 years old, his father had invited him on a motorcycle ride (Tr. 2108, 2601, 2624).[5] Deandra was living with his mother's family, and they had not let him go with his father because he had chores to do first (Tr. 2557, 2597, 2601, 2612, 2622). This made him angry, but he stayed home and swept the floor like he was supposed to do (Tr. 2601). About twenty minutes later, someone came running to the door to tell Deandra that his father had been in an accident (Tr. 2108, 2601). Deandra ran out the door and through the neighborhood (Tr. 2108, 2601). He found his father "fatally injured … it was very gory." (Tr. 2108-2109, 2601). Deandra never cried, he bottled this tragedy only to suffer flashbacks to it that still cause him considerable distress (Tr. 2109-2110, 2602).

Dr. Poch administered several standardized tests, finding that Deandra fell in the clinical range for Post-traumatic Stress Disorder, Delusional Disorder, Paranoia, Hypomania, Depression and Anxiety (Tr. 2100-2101, 2127, 2133-2134, 2136, 2140-2145, 2188-2189, 2191-2195). He suffers severe impairment from PTSD (Tr. 2142-2145), and his paranoia and hypomania scores indicate psychosis (Tr. 2127-2128, 2130, 2132). Over the years, Deandra also became Cocaine Dependent, and, during periods of intoxication, he has Cocaine-Induced Psychotic Disorder with Delusions (Tr. 2111, 2152-2155). On November 7, Deandra was intoxicated, having used cocaine almost nonstop

[5] For ease of discussion, penalty phase evidence describing this tragedy is being included.

for the prior 24 hours (Tr. 2111, 2149). He was dependent on cocaine (Tr. 2186-2187). Rats that become dependent on cocaine "will go to cocaine, eat crack cocaine…rather than eat food, and they'll die" (Tr. 2186).

Dr. Poch could not discern whether Deandra's delusional thoughts at the time of the murders resulted from his Delusional Disorder, his cocaine intoxication, or a combination of the two (Tr. 2185, 2214). Deandra suffered delusions that "he was in danger," and those delusions diminished his capacity (Tr. 2170-2172, 2178-2179, 2182, 2200, 2208-2210, 2214). "He was faced with options that were not based in reality" (Tr. 2197-2199, 2214).

Prosecutor Kevin Crane asked Dr. Poch if he saw Deandra's jail records that showed that he had notified "jail personnel [in August 2001] that he was changing his religion to that of Muslim" (Tr. 2315). When Dr. Poch recalled that, Prosecutor Crane asked whether any of Deandra's "problems" would prevent him from "keep[ing] up with current events" (Tr. 2315). Dr. Poch replied that they would not, and Prosecutor Crane repeated, "He could read, he could know what's going on in the outside world." (Tr. 2315). Dr. Poch answered, "Correct." (Tr. 2315).

The jury deliberated for just under five hours before finding Deandra guilty of three counts of first-degree murder and one count of first-degree assault (Tr. 2453-2459; L.F. 352-355).

In aggravation of punishment, the State used the multiple homicides to submit two statutory aggravating circumstances for each count of murder (Tr. 2467, 2476; L.F. 357, 363, 369). It also presented evidence of Deandra's prior misdemeanor convictions (Tr.

2468, 2535-2536; Exs. 47, 48) and his unadjudicated bad acts (Tr. 2478-2487, 2525-2526, 2530-2531). Finally, it presented victim impact evidence from Juanita's daughter (Tr. 2492-2502), William's children (Tr. 2503-2513, 2514-2520) and Angela's mother (Tr. 2521-2535). When the defense began its case, Juanita's family testified that it had "lost so much already" and did not "want anything to happen to [Deandra]." (Tr. 2606-2607, 2615-2616, 2626).

Deputy Graves from the Boone County Jail described Deandra as polite, respectful and cooperative (Tr. 2576, 2583). Deandra "followed the rules for the most part," although he was disciplined for a few incidents (Tr. 2578-2581, 2584). Boone County Jail is a new facility, but it suffers from over-crowding, and some inmates are occasionally transferred to Callaway County (Tr. 2578-2579, 2587). Deandra was transferred to Callaway County nine times during 2001 (Tr. 2628). Sgt. Lynn from the Callaway County Jail noted that Deandra followed all the rules and complied with everything asked of him while in their facility (Tr. 2630).

Prosecutor Crane used Graves and Lynn to portray incarceration as easy, noting that "the inmates aren't in a cage with bars…" (Tr. 2587). "They can hang out, move about, watch TV, read, talk to each other" (Tr. 2591, 2595). They can play card games (Tr. 2591). They get recreation (Tr. 2587). They can use the telephone (Tr. 2595). Occasionally, they even get to order delivery pizza (Tr. 2631).

The defense offered "*Life Means Life,*" a video depicting life at Potosi Correctional Center (Tr. 2550-2553; Ex. U). The video would have shown jurors that Potosi controls the movement of its inmates 24 hours a day, 7 days a week (Ex. U). All

inmates are always accounted for, and, in the unlikely event that the prison loses track of an inmate, it can lock-down the facility within minutes (Ex. U). The prison is surrounded by a double fence, razor wire and electronic sensors (Ex. U). The perimeter is patrolled 24 hours a day, seven days a week, 365 days a year (Ex. U). An armed "E-squad" stands ready to take control of the prison (Ex. U). Prosecutor Crane objected, and the court excluded Ex. U, opining, "I know of situations in the last year where the governor has been asked to commute sentences of people doing life without parole." (Tr. 2553). Then, in closing argument, Prosecutor Crane complained:

> Prison is what they want. The defense attorney called it oppressive tyranny of the penitentiary. Is that what you've heard about today?
>
> He can cruise around in a big room … He can chat with the guards, you know. No, he's -- he's doing real well in there: TV, meals, plenty of recreation whenever he wants it.

(Tr. 2674).

After deliberating on Deandra's punishment for almost three hours, the jury asked whether there was any circumstance under which Deandra "may ever be released from incarceration" (Supp.L.F. 12; Tr. 2680). The court proposed responding that it could not answer the question (Tr. 2681). The defense first responded that it could not think of a better answer, but, then, immediately proposed that the court simply say "no" (Tr. 2681). The court instructed the jury, "I cannot answer your question. Please follow your instructions." (Tr. 2681). The jury believed that Deandra would be out in fifteen years "doing the same thing" (Proportionality Exhibit A).

Two hours later, the jury returned to open court with verdicts announcing only that it had been "unable to decide or agree upon punishment" on any of the three counts of murder (L.F. 383-385; Tr. 2680-2682). The defense had proposed modifications to the MAI verdict forms, and the modifications would have required the jury to announce its findings at each step of the inquiry so that it would be clear at which step it became undecided (Tr. 2652-2653; L.F. 379-381). Seeking to clarify at which step the jury became deadlocked, Prosecutor Crane asked, "Judge, do they need to write down the aggravating circumstances?" (Tr. 2683). The court said "[n]o" and took a short recess (Tr. 2683-2684). Upon returning, Judge Hamilton found that (1) the State had proved each statutory aggravator beyond a reasonable doubt, (2) the facts and circumstances in aggravation warrant death, (3) the facts and circumstances in mitigation did not outweigh those in aggravation and (4) death was the appropriate sentence for each count of murder (Tr. 2684-2686).

On April 22, 2002, over objection, Judge Hamilton sentenced Deandra to death for each count of murder (Tr. 2688-2693, 2696; L.F. 426-430, 437-440, 441-443). Judge Hamilton also sentenced Deandra to life for the assault (Tr. 2696; L.F. 442).

This appeal follows.

Points Relied On

I. Unconstitutional Jury Selection Procedure

The trial court erred in overruling Deandra's repeated objections that Henry County's jury selection procedure systematically excludes the blind and disabled, resulting in a jury that did not represent a fair cross-section of the community and violating due process, equal protection, and the prohibition against cruel and unusual punishment. U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 2, 10, 18(a), 21. Henry County obtains DOR's list of licensed drivers over age 20 and uses it, alone, as the County's master list of jurors. This procedure systematically excludes blind and disabled individuals whose condition prohibits them from obtaining a driver's license. Presiding Judge Roberts agreed that this group of individuals is not legally disqualified, they simply are "not selected" for Henry County jury service.

Taylor v. Louisiana, 419 U.S. 522 (1975);

Duren v. Missouri, 439 U.S. 357 (1979);

Galloway v. Superior Court, 816 F.Supp. 12 (D.D.C. 1993);

People v. Caldwell, 603 N.Y.S.2d 713, 714 (City Crim.Ct. 1993);

U.S. Const., Amends. V, VI, VIII, XIV;

Mo. Const., Art. I, §§ 2, 10, 18(a), 21; and

§§302.173, 302.175

II. Jury Selection – Substantial Noncompliance

The trial court erred in overruling Deandra's objections to Henry County's jury selection procedure because the County does not substantially comply with §§494.400-.505, resulting in a jury that does not represent a fair cross-section and violates Deandra's rights to equal protection, due process and freedom from cruel and unusual punishment under U.S. Const., Amends. V, VI, VIII, XIV and Mo. Const., Art. I, §§ 2, 10, 18(a), 21. Henry County's procedure substantially deviates from the statutory mandate:

§494.410: Henry County, which has 15,988 residents over age 20, consults DOR's list of 20,009 licensed drivers. Rather than selecting 5% from DOR's list to compile its Master List, Henry County calls DOR's entire list, which contains 25% more people than Henry County has residents, its Master List.

§494.415: Ignoring the statutory mandate to sanitize the Master List, Henry County never deletes disqualified jurors from DOR's list, but only deletes them from a list of 500 names randomly drawn from DOR's list.

§494.430: Henry County randomly selects 500 names from DOR's list and sends each person a juror qualification form. Judge Roberts lets clerks use "their sound judgment" to excuse obviously sick or injured jurors. Clerks also excuse jurors they know to be on vacation.

These systemic deviations from the statutory mandate do not yield a fair cross section of Henry County since they exclude all "blind and disabled" persons. These violations prejudiced Deandra in that they skew the population of potential jurors

such that, here, nearly four out of five people drawn from the Master List provided by DOR proved to be unqualified to sit as jurors in Henry County.

State v. Rowe, 63 S.W.3d 647 (Mo.banc 2002);

Murray v. Missouri Highway Transportation Commission, 37 S.W.3d 228, 233 (Mo. banc 2001);

State v. Gresham, 637 S.W.2d 20 (Mo.banc 1982);

State v. Anderson, 79 S.W.3d 420 (Mo.banc 2002);

U.S. Const., Amends. V, VI, VIII, XIV;

Mo. Const., Art. I, §§ 2, 10, 18(a), 21;

§§494.410, 494.415, 494.420, 494.430, 494.465.

III. Stacking the Deck: Striking Juror Tucker

The trial court abused its discretion in overruling Deandra's objection and striking Juror Tucker for cause because that ruling deprived Deandra of his rights to due process, a fair and impartial jury and to be free from cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. The State agreed that it had been "[e]stablished" that Juror Tucker believed that the death penalty is appropriate in some cases. Juror Tucker unequivocally stated that she could consider and recommend the death penalty and that she would follow the court's instructions. She simply did not want to serve as foreperson and sign the verdict. Since there is no legal requirement that any juror accept the role of foreperson, Juror Tucker's desire not to be foreperson did not prevent or substantially impair her from abiding by her oath and the court's instructions.

Adams v. Texas, 448 U.S. 38 (1980);

Gray v. Mississippi, 481 U.S. 648 (1987);

State v. Kreutzer, 928 S.W.2d 854 (Mo.banc 1996);

Wainwright v. Witt, 469 U.S. 412 (1985);

U.S. Const., Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21.

IV. Stacking the Deck: Seating Juror Waggoner

The trial court abused its discretion in refusing Deandra's motion to strike Juror Waggoner for cause because that ruling deprived Deandra of his rights to due process, a fair and impartial jury and to be free from cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. Waggoner testified that he would expect the defense to present evidence to convince him that life without parole was the appropriate sentence. Later, he volunteered a clarification, emphatically stating, "So if the defense did absolutely nothing, if the prosecutor convinced me that this person was – had did the crime, it would be death. *I would not consider life without parole and put the expense on the taxpayers*." Waggoner sat on Deandra's jury.

Ross v. Oklahoma, 487 U.S. 81 (1988);

State v. Divers, 681 So.2d 320 (La. 1996);

Wainwright v. Witt, 469 U.S. 412, 424 (1985);

Morgan v. Illinois, 504 U.S. 719 (1992);

U.S. Const., Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21;

V. Improper Evidence: Linking Deandra to 9/11

The trial court plainly erred, resulting in manifest injustice, in failing to declare a mistrial *sua sponte* after the State linked Deandra to 9/11 because that ruling deprived Deandra of due process, a fair trial before a fair and impartial jury and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends., V, VI, VIII, XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. First, the State asked Dr. Poch whether Deandra had notified jail personnel in August 2001 that he was changing his religion to Muslim. Then, when Dr. Poch acknowledged this, the State asked, "Would his ability to keep up with current events in any way be impaired as a result of all these problems you say he's got?" Neither question had any relevance to this case. By connecting Deandra's conversion to Islam to "current events," the State could only have wanted to fan the flames of prejudice by linking Deandra to terrorism; after all, Dr. Poch testified just two days after the six month anniversary of 9/11.

Viereck v. United States, 318 U.S. 236 (1943);

Old Chief v. United States, 519 U.S. 172 (1997);

State v. Bernard, 849 S.W.2d 10 (Mo.banc 1993);

U.S. Const., Amends., V, VI, VIII, XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21;

Rule 30.20.

VI. The State Opened the Door to "*Life Means Life*"

The trial court abused its discretion in refusing to admit Defense Ex. U, a video entitled "*Life Means Life,*" which depicts life at Potosi Correctional Center and plainly erred in not declaring a mistrial when the State argued the lack of evidence about life in a maximum security prison like Potosi because those rulings violated Deandra's rights to due process, present a defense and a fair trial, and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. After successfully objecting to Ex. U, the State belittled the defense description of prison as oppressive, arguing, "Is that what you've heard about today?" Having elicited that inmates in county jail enjoy such luxuries as recreation, television, and even delivery pizza, the State implied that aptly described life in prison as well: "He can cruise around in a big room there with his buddies" and enjoy "TV, meals, plenty of recreation *whenever he wants it.*" If left uncorrected, these errors will cause a manifest injustice.

State v. Kleypas, 40 P.3d 139 (Kan. 2001);

State v. Weiss, 24 S.W.3d 198 (Mo.App., W.D. 2000);

State v. Bernard, 849 S.W.2d 10 (Mo.banc 1993);

Gardner v. Florida, 430 U.S. 349 (1977);

U.S. Const., Amends. V, VI, VIII, XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21;

Rule 30.20.

VII. Refused to Answer: How long is life?

The trial court plainly erred, resulting in manifest injustice, when it refused to answer after the jury asked whether Deandra would ever be released from a sentence of life without parole because that ruling violated Deandra's rights to due process, a fair trial before a properly instructed jury and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. After approximately three hours of deliberating, the jury asked the court how long life in prison would really be. The court replied, "I cannot answer your question. Please follow your instructions." The instructions, as given, had not made it clear to the jury that a sentence of life without parole means just that – life in prison without parole. The court left the jury to rely on its collective common sense that, after serving only 15 years on a life sentence, Deandra would be "out there doing the same thing."

Simmons v. South Carolina, 512 U.S. 154 (1994);

State v. Thompson, 85 S.W.3d 635 (Mo.banc 2002);

Bruce v. State, 569 A.2d 1254 (Md.App. 1990);

Bollenbach v. United States, 326 U.S. 607 (1946);

U.S. Const., Amends. V, VI, VIII, XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21;

§565.020;

Rule 30.20.

VIII. *Ring v. Arizona*: Sentenced by Court

The trial court erred in sentencing Deandra to death because adhering to the dictates of §565.030.4(4) violated Deandra's rights to due process and a jury trial and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. First-degree murder is punished by imprisonment for life without parole *unless* a jury finds all essential facts necessary to impose death, i.e., that (a) at least one statutory aggravator exists for each murder, (b) the "facts and circumstances in aggravation…, taken as a whole" warrant death, and (c) the "facts and circumstances in mitigation" do not outweigh the "facts and circumstances in aggravation." Deandra's jury could not decide punishment, and rather than polling the jury to determine whether it had made these three factual findings, the trial court, pursuant to §565.030.4(4), began the deliberative process anew, made the three essential factual findings, *sua sponte*, and sentenced Deandra to death. Since this sentencing procedure is unconstitutional, §565.040.2 requires this Court to order Deandra be sentenced to life without parole.

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002);

United States v. Gaudin, 515 U.S. 506 (1995);

Sullivan v. Louisiana, 508 U.S. 275 (1993);

State v. Thompson, 85 S.W.3d 635 (Mo.banc 2002);

U.S. Const., Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21;

§§565.030, 565.040;

MAI-CR3d 313.40, 313.41A, 313.44A,

IX. Refusing Verdicts Forms G, H, I

The trial court erred in refusing to submit Verdict Forms G, H, and I because that ruling violated Deandra's rights to due process, a fair trial before a properly instructed jury and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. *Apprendi v. New Jersey* made clear that all facts essential to making an enhanced sentence available must be found by a jury. When, as here, the jury cannot decide upon punishment, it returns a general verdict, patterned after MAI-CR3d 313.58A, which does not disclose whether it found the essential facts. The modifications in proposed Verdict Forms G, H, and I, briefly, simply and impartially required the jury to announce the essential facts it had found and would have enabled the trial court to follow the mandate of *Apprendi v. New Jersey* and *Ring v. Arizona*.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Jones v. United States, 526 U.S. 227 (1999);

State v. Carson, 941 S.W.2d 518 (Mo.banc 1997);

Gay v. United States, 2003 W.L. 168416 (S.D.N.Y. 1/24/2003);

U.S. Const., Amends. V, VI, VIII and XIV;

Mo. Const., Art. I, §§ 10, 18(a) and 21;

§§565.030

MAI-CR3d 313.58A

Argument

I. Unconstitutional Jury Selection Procedure

The trial court erred in overruling Deandra's repeated objections that Henry County's jury selection procedure systematically excludes the blind and disabled, resulting in a jury that did not represent a fair cross-section of the community and violating due process, equal protection, and the prohibition against cruel and unusual punishment. U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 2, 10, 18(a), 21. Henry County obtains DOR's list of licensed drivers over age 20 and uses it, alone, as the County's master list of jurors. This procedure systematically excludes blind and disabled individuals whose condition prohibits them from obtaining a driver's license. Presiding Judge Roberts agreed that this group of individuals is not legally disqualified, they simply are "not selected" for Henry County jury service.

Missourians with a physical impairment that interferes with their ability to operate an automobile safely cannot get a driver's license. §§302.173.1; DOR's Driver Condition Report (disqualifying impairments include seizure disorders, sleep disorders, blindness and limited mobility), available at http://dor.state.mo.us/mvdl/drivers/forms/condition.pdf Legally blind individuals cannot drive. §302.175. Blind and disabled individuals are, however, "eligible for jury service" (Tr. 377). But they "would not be selected" for jury service in Henry County (Tr. 377).

In 1992, the Board of Jury Commissioners for Henry County met and "drew up" the County's jury selection procedure and limited its jury pools to "licensed Missouri drivers over age 20" (Tr. 357; Ex. 1). The Board did not consider that this procedure systematically excludes blind and disabled individuals (Tr. 377). It chose this list out of convenience – DOR already made this list readily available (Tr. 376; Ex. 1).

Just as being legally blind does not disqualify one from becoming a judge, "blindness alone does not disqualify an individual from serving on many juries." *Galloway v. Superior Court*, 816 F.Supp. 12, 19 (D.D.C. 1993); *People v. Caldwell*, 603 N.Y.S.2d 713, 714 (City Crim.Ct. 1993). Nonetheless, a legally blind person "would not be selected" for jury service in Henry County (Tr. 377). Limiting jury service to licensed drivers denied Deandra his state and federal constitutional rights to a jury drawn from a fair cross-section of the community, as well as due process, equal protection, and the prohibition against cruel and unusual punishment.

The Community

Our system puts great confidence in the collective commonsense of its juries. Juries, however, can only reach a commonsense judgment if they "consist[] of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). As instruments of public justice, juries must be truly representative of the community. *Id.* at 527. Their purpose, after all, is to guard against the exercise of arbitrary power and to provide the community's commonsense judgment "as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or

biased response of a judge." *Id.* at 530. "This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Id.* Without a jury truly representative of the community, there can be no confidence in the fairness of the criminal justice system. *Id.*

The Sixth Amendment ensures litigants a jury drawn from a "fair cross-section" of the community. *Id.* To that end, Equal Protection also guarantees that each distinct group in the community will be fairly represented on the venire. *Hernandez v. Texas*, 347 U.S. 475, 476-482 (1954). And, Due Process protects a defendant from being tried by a jury that is selected in an arbitrary or discriminatory manner. *Peters v. Kiff*, 407 U.S. 493, 502 (1972). When a County adopts a procedure that excludes a distinct group or groups, it creates two problems with constitutional ramifications: potential prejudice against the defendant and stigmatization of the excluded group. *Barber v. Ponte*, 772 F.2d 982, 984 (1st Cir.1985).

With these principles in mind, the defense objected to Henry County's jury selection procedure (Supp.L.F. 1-10, 20-22; Tr. 332, 393-396, 1209-1210). Deandra made a prima facie case by showing that (1) the excluded group is "distinctive" within the community; (2) it is unfairly under-represented in the venires; and (3) the under-representation is due to systematic exclusion. *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *State v. Anderson*, 79 S.W.3d 420, 430 (Mo.banc 2002). Once he did that, the burden shifted to the State to show either that there was no disparate impact or that a fair cross-section cannot be attained because of a significant state interest. *Duren, supra* at 367-368.

First, Deandra identified the group that Henry County systematically excludes by pulling its jury pools only from "licensed Missouri drivers over twenty years of age." (Ex. 1). Henry County's procedure excludes anyone who does not have a driver's license. One group that is disparately affected by this exclusion is the blind and disabled who cannot obtain a driver's license. §§302.173, 302.175. Of course, the question remains whether the blind and disabled comprise a distinct group in Henry County, i.e., is it a group that warrants protection. Gender warrants protection. *Taylor, supra*; *Duren v. Missouri*, 439 U.S. 357, 371 (1979); §494.400. So does race. *Carter v. Jury Commission*, 396 U.S. 320, 330 (1970); §494.400. And poverty. *Thiel v. Southern Pacific*, 328 U.S. 217, 224-225 (1946); §494.400. Disability does, too. *Galloway, supra*; ADA 42 USC § 12132.

The only question, then, is whether there is a distinct group of persons in Henry County who have a physical disability that precludes them from driving? Absolutely. Its 573 "blind and disabled" residents. *Henry County Demographic Profile*[6] at ¶15; SSI Recipients, Dec 2001.[7] The "blind and disabled" group comprises a much larger share of Henry County's population than would be expected. Henry County has 21,997 residents, who represent 0.00393% of the 5,595,211 Missourians. *See MO Census Data Center*

[6] Downloaded from http://mcdc2.missouri.edu/websas/dp3_2kmenus/mo/Counties.html.

[7] To open this PDF file requires Acrobat Reader. Alternatively, click on this internet link http://www.ssa.gov/statistics/ssi_st_cty/2001/ssi_sc01.pdf.

[8]online. Its 573 "blind and disabled" residents, however, represent 0.00566% of the 101,274 blind and disabled Missourians. *See* SSI Recipients, Dec 2001. The "blind and disabled" group in Henry County is roughly 140% the size one would expect it to be. It is also 250% larger than the County's largest racial minority groups: African-American (219), Hispanic (219), and multi-race (226). *Henry County Demographic Profile* at ¶3. Clearly, the "blind and disabled" comprise a distinct group in Henry County.

Equally clear is that Deandra has proved the latter two prongs of the prima facie case. The "blind and disabled," as a group, has been unfairly under-represented on Henry County venires for more than 10 years. Indeed, they have not been represented at all because, in 1992, the County decided to limit its jury pool to "licensed Missouri drivers under twenty years of age." (Ex. 1; Tr. 357). It made this decision without even considering the exclusion experienced by the "blind and disabled." (Tr. 377). Henry County systemically excludes this group.

> Q. [by defense counsel] But in Henry County, in choosing to use the one list, those people would not be eligible for jury service; is that correct?
>
> A. [by Judge Roberts] **They would not be selected for jury service**. They are eligible for jury service.

(Tr. 377) (emphasis added).

> Q. If they're [sic] sight impairment is such they cannot qualify to get a driver's license, **your system excludes them from being on a jury**, does it not?

[8] http://mcdc2.missouri.edu/websas/dp3_2ktmenus/mo/Counties.html

A. **Yes**, it does.

(Tr. 378) (emphasis added). Judge Roberts admitted that the same is true regarding any physical disability that prevents a person from driving (Tr. 378-379).

Once Deandra made his prima facie case, the burden shifted to the State to justify its procedure. The State had to show that "attainment of a fair cross-section [is] incompatible with a significant state interest." *Duren*, 439 U.S. at 367-368. *Id.* at 368. As in *Duren*, "[t]he record contains no such proof…" *Id.* at 369.

The only justifications offered for Henry County's discriminatory procedure came from Judge Robert. He explained that the County chose to use driver's licenses because "[t]hey were readily available from the Department of Revenue on computer diskettes that we could use for selection." (Tr. 376). Just because a list is readily available does not make that list constitutionally adequate, nor does it create a significant state interest. Judge Roberts also tried to justify Henry County's procedure, saying that "they had also been judicially determined to be a valid list for selecting jurors." (Tr. 376). One such case was decided about six months before Henry County's Board of Jury Commissioners adopted the procedure at issue here. *See State v. Rogers*, 825 S.W.21d 49, 51 (Mo.App., W.D. 1992). *Rogers* does not stand for the proposition that a list of licensed drivers is *per se* valid. Quite the opposite. *Rogers* simply illustrates that a defendant must make a prima facie case. There, Rogers argued that, by using a list of licensed drivers, Daviess County was excluding Amish people from its jury pool. *Id.* Rogers, however, offered no proof, just his assertions.

Deandra has made his prima facie case. He has identified "blind and disabled" as a distinctive group in Henry County that is systematically excluded by the County's selection procedure. Judge Roberts even testified that members of this group are "not selected" for juries in Henry County. This Court must reverse Deandra's convictions and sentences and remand for a new trial before a properly selected jury.

II. Jury Selection – Substantial Noncompliance

The trial court erred in overruling Deandra's objections to Henry County's jury selection procedure because the County does not substantially comply with §§494.400-.505, resulting in a jury that does not represent a fair cross-section and violates Deandra's rights to equal protection, due process and freedom from cruel and unusual punishment under U.S. Const., Amends. V, VI, VIII, XIV and Mo. Const., Art. I, §§ 2, 10, 18(a), 21. Henry County's procedure substantially deviates from the statutory mandate:

§494.410: Henry County, which has 15,988 residents over age 20, consults DOR's list of 20,009 licensed drivers. Rather than selecting 5% from DOR's list to compile its Master List, Henry County calls DOR's entire list, which contains 25% more people than Henry County has residents, its Master List.

§494.415: Ignoring the statutory mandate to sanitize the Master List, Henry County never deletes disqualified jurors from DOR's list, but only deletes them from a list of 500 names randomly drawn from DOR's list.

§494.430: Henry County randomly selects 500 names from DOR's list and sends each person a juror qualification form. Judge Roberts lets clerks use "their sound judgment" to excuse obviously sick or injured jurors. Clerks also excuse jurors they know to be on vacation.

These systemic deviations from the statutory mandate do not yield a fair cross section of Henry County since they exclude all "blind and disabled" persons. These violations prejudiced Deandra in that they skew the population of potential jurors

such that, here, nearly four out of five people drawn from the Master List provided by DOR proved to be unqualified to sit as jurors in Henry County.

Henry County has **15,988** residents over age 20. 2000 Census: Henry County.[9] In compiling its jury list, it requests a list of "licensed Missouri drivers over twenty years of age." The Department of Revenue (DOR), via the Office of Administration, provides Henry County with a list of **20,009** names (Tr. 352). Henry County calls this its master jury list (Tr. 336-337, 352, 365, 367-368). This list is **25%** larger than the county's pertinent population. It includes at least **4,021** people who simply cannot be qualified to serve on a Henry County jury. Yet, Henry County never cleans up DOR's list by deleting any disqualified individuals from this list (Tr. 340-341, 370-371, 382). The County simply recycles the disqualified names each term. *Id.*

Three times each year, Henry County prepares for a new court term. Using a computer, Henry County randomly selects 500 names from DOR's contaminated list of 20,009 names (Tr. 337-339). On average, this list of 500 can be expected to include roughly **125** people who are not qualified to serve on a Henry County jury. After sending questionnaires to these 500 individuals, the County is able to identify those who are not qualified to sit on a Henry County jury (Tr. 339-342). The County deletes the disqualified jurors from this list of 500, but not from DOR's list (Tr. 341-345, 370-371). Deandra objected that Henry County does not substantially comply with the jury selection statutes resulting in a jury that did not represent a fair cross-section of the

[9] http://mcdc2.missouri.edu/webrepts/sdcprofiles1/mo/050_29083_Henry_County

County and that violated Deandra's rights to equal protection, due process and freedom from cruel and unusual punishment. (Supp.L.F. 1-10, 20-22).

The Duck Test

Just calling DOR's list the County's master jury list, doesn't make it the Master List. The question is whether DOR's list is the master jury list, i.e., does it waddle and quack like a duck. It doesn't.

Autonomy is the first attribute of a Master List. The General Assembly has spoken directly to the County: "The board of jury commissioners shall ***compile and maintain*** [a master jury list.]" §494.410 (emphasis added). To do that, the County must consult one or more public records to produce a list that represents a fair cross-section of the community. §494.410. Out of convenience, Henry County has chosen to consult only DOR's list of licensed drivers over age 20 (Ex. 1). Henry County does nothing more; it simply stops and calls this list its master jury list (Tr.367). Since DOR's list excludes "blind and disabled," it does not represent a fair cross-section of Henry County. *See* Point I, supra.

In *State v. Anderson*, 79 S.W.3d 420, 430-431 (Mo.banc 2002), this Court concluded that §494.410 does not preclude counties from having a Master List that "*consists of*" the entire public record. (emphasis in original). *Anderson*, however, does not consider the statutory requirements of randomness and cleanliness. *Anderson* must be reconsidered.

The General Assembly did not envision the entire public record simply being relabeled as the Master List. It mandated, "The master jury list ***shall be the result of random selection*** of names ***from public records***." §494.410 (emphasis added). This statutory language is mandatory and unambiguous. The judiciary must give effect to a statute's plain meaning. *State v. Rowe*, 63 S.W.3d 647, 649 (Mo.banc 2002). After all, the Legislature is presumed **not** to have intended a meaningless act. *Murray v. Missouri Highway Transportation Commission*, 37 S.W.3d 228, 233 (Mo. banc 2001) (quotation omitted). The Legislature made a public policy decision to require counties to randomly select their Master Lists from public records. The judiciary cannot "ignore, emasculate, or set aside" that statutory requirement. *State v. Gresham*, 637 S.W.2d 20, 26 (Mo.banc 1982).

Judge Roberts defended Henry County's procedure as "a total selection" (Tr. 367). That illustrates the problem. The County exercises absolutely no control over the list it gets from DOR. This is not what the Legislature intended when it mandated that counties "shall compile and maintain" a Master List. §494.410. "The primary rule of statutory construction is to ascertain the intent of the Legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." *Murray*, 37 S.W.3d at 233. To maintain the Master List, the Legislature commanded that all disqualified jurors "***shall be deleted***" from the Master List. §494.415.2 (emphasis added). The Legislature intended for counties to maintain a clean list of potential jurors. Henry County ignores this mandate. It never deletes even a single disqualified juror from the list it receives from DOR (Tr. 341, 370-371).

Henry County has a list that ***could*** waddle like a duck and quack like a duck. The County randomly draws 500 names from DOR's list, and it deletes disqualified jurors from that list of 500 (Tr. 337-345). Unfortunately, this list of 500 is not a duck, either, since it lacks the final criteria for a Master List – i.e., viability. To obtain a representative sample of the community, the legislature mandated, "The master jury list ***shall be comprised of not less than five percent*** of the total population of the county or city not within a county as determined from the last decennial census." §494.410 (emphasis added). Thus, having 21,997 residents, Henry County's Master List must contain at least **1,100** jurors. 2000 Census: Henry County.[10] Its list of 500 falls substantially short of the legislative mandate.

It Doesn't Get Any Better

Theoretically, when a jury is needed, the judge designates how many jurors are needed and "[t]his number of jurors shall be randomly selected…from the qualified list." §494.420.2. This is not how things happen in the real world. Henry County has the computer program needed to select jurors at random (Tr. 347), but its list of qualified jurors simply isn't big enough to permit random selection. Using DOR's grossly contaminated list to create its qualified list, Henry County must first delete masses of disqualified jurors. Here, the County had to delete 394 of the 500 names on this list (Tr. 359). Only 106 jurors remained available, and Judge Roberts had designated that over

[10] http://mcdc2.missouri.edu/webrepts/sdcprofiles1/mo/050_29083_Henry_County

200 jurors would be needed (Tr. 359-360). Even using all 106 left a significant shortfall. To make up the difference, Judge Roberts ordered the clerks to pull a "special panel" of 125 names from DOR's list (Tr. 359-360).

Once the pool of jurors is established, the County must decide which of the jurors to summons. The Legislature decided to permit potential jurors to apply for a postponement of their service so long as any postponement is approved pursuant to "written guidelines adopted by the circuit court…." §494.415.3. Henry County does not summons every qualified juror selected for the case. When preparing the summonses, the clerks *sua sponte* skip the names of any juror they know to have vacation plans (Tr. 351-352). There is no written guideline for their actions, and "[a]t least one" vacationing juror was skipped in this case (Tr. 351).

Finally, the Legislature determined that "[a]ny person upon whom service as a juror would ***in the judgment of the court*** impose an extreme hardship" is entitled to be excused from service. §494.430(4). Henry County handles this situation a bit differently. If someone who receives a summons is sick or injured, he or she may ask to be excused, and **most** such requests are submitted to Judge Roberts (Tr. 362). Judge Roberts, however, does not see them all. He has vested the clerks with discretion to use "**their** sound judgment" to excuse jurors who are vomiting or have a broken leg, "these kind of things." (Tr. 343, 364) (emphasis added).

Henry County does not comply with the Legislature's unambiguous mandate to "***compile and maintain***" a randomly drawn list of potential jurors from which those who are disqualified are deleted so that the list may serve as a master jury list. The County,

instead, relies on a contaminated public record that lists 25% more people than the County's pertinent population. As a result, the County, as it did here, runs out of jurors. And, then, despite the scarcity of qualified jurors, the County lets its clerks skip those persons with vacation plans and excuse persons with illness or injury.

Substantial Noncompliance

Substantial noncompliance with the statutory mandate must be remedied. §494.465.2; *Anderson*, *supra*. "[A] 'substantial' failure to comply is one that either rises to the level of a constitutional violation, and/or that actually prejudices a defendant." *Anderson*, 79 S.W.3d at 431. Henry County's noncompliance does both.

Henry County's selection procedure violates the Constitution as it does not yield a fair cross-section of the community. By limiting jury service to "licensed Missouri drivers over age 20," Henry County has systematically excluded its "blind and disabled" residents. *See* Point I, supra. The problem, however, does not end with this distinct group's exclusion from jury service. The County's procedures so skew the population of potential jurors as to make it impossible to produce a "fair cross-section." DOR's list contains 25% more people over age 20 than reside in Henry County. Using DOR's list as its Master List and refusing to delete these nonresidents from it, Henry County can expect 25% of those randomly selected for its list of 500 qualified jurors to be disqualified. This yields a substantially different pool than the Legislature intended.

This widespread contamination is only one part of the problem. Henry County exacerbates the contamination by drawing only 500 names for its qualified list. Such a

small sampling skews the results. Nearly 400 of the 500 people selected for the qualified list were actually disqualified. Can one deduce from this that 15,840 of the 20,009 names provided by DOR are disqualified? Clearly, not. The sample of 500 is simply too small to draw a representative sampling of the County. Drawing 500 names and surmising that they are a fair cross-section of the County is akin to flipping a coin ten times, and upon seeing seven "heads," extrapolating that one could expect the coin to come up "heads" 70% of the time. While DOR's list suffers widespread contamination, it cannot be as contaminated as the list of 500 suggests. Without a sufficiently large sample population, a fair cross-section of the target population cannot be produced. The Legislature believes that a valid sample must include at least 5% of the County's population. §494.410.

Henry County's noncompliance actually prejudiced Deandra. The violations are not technical or minor deviations; they are systemic. The violations result in widespread contamination that made it impossible to pick a jury through ordinary means. When Henry County finally finished deleting all of the disqualified jurors from its alleged qualified list of 500 in this case, it "had only 106 persons" (Tr. 350, 359). When deciding who to summons for voir dire, clerks skipped "[a]t least one" of these 106 jurors because that person had vacation plans. Ultimately, only 83 of the 106 were brought in for Deandra's voir dire, producing only 9 of Deandra's final jurors (L.F. 319-320; Tr. 402). To fill up the jury box, Henry County had to draw a "special panel" of 125 from the Master List provided by DOR, of which 33 appeared for voir dire (Tr. 359-360, 1005; L.F. 321).

Henry County's violations of the statutorily mandated procedures are fundamental and systemic. They appear at every step of the process, directly affecting the County's ability to select a list of 500 people who are qualified to serve on a Henry County jury. When nearly four out of five people drawn from the Master List provided by DOR are disqualified to be jurors, there is a deep-rooted and systemic flaw in the procedures that cannot be tolerated. This Court must reverse Deandra's convictions and sentences and remand for a new trial before a properly selected jury.

III. Stacking the Deck: Striking Juror Tucker

The trial court abused its discretion in overruling Deandra's objection and striking Juror Tucker for cause because that ruling deprived Deandra of his rights to due process, a fair and impartial jury and to be free from cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. The State agreed that it had been "[e]stablished" that Juror Tucker believed that the death penalty is appropriate in some cases. Juror Tucker unequivocally stated that she could consider and recommend the death penalty and that she would follow the court's instructions. She simply did not want to serve as foreperson and sign the verdict. Since there is no legal requirement that any juror accept the role of foreperson, Juror Tucker's desire not to be foreperson did not prevent or substantially impair her from abiding by her oath and the court's instructions.

The State agreed that Juror Tucker (#12) unequivocally "[e]stablished" her belief that the death penalty is appropriate in some cases (Tr. 680-681). Tucker was one of only two African-Americans on Deandra's venire (Tr. 700-701).[11] She would consider and could recommend death (Tr. 621-622, 680). She simply would be unwilling to be foreperson (Tr. 620-623, 681-682). Of course, "[Missouri has] no requirement that a prospective juror demonstrate that he is qualified to serve as foreperson in a capital trial." *State v. Kreutzer*, 928 S.W.2d 854, 866 (Mo.banc 1996). Nevertheless, over Deandra's

[11] None sat on Deandra's jury (L.F. 319, 321, 399).

objection, the court granted the State's motion to strike Tucker for cause (Tr. 701-703, 705; Supp.L.F. 26-27). The court lacked discretion to do so, as that ruling denied Deandra due process and a fair and impartial jury and subjected him to cruel and unusual punishment.

Whether a juror is qualified is addressed to the trial court's sound discretion since that court has the opportunity to see and hear the juror's entire responses. *State v. Clayton*, 995 S.W.2d 468, 475 (Mo. banc 1999). The trial record, however, must disclose a "definite impression that a prospective juror would be unable to faithfully and impartially [sic] apply the law." *Wainwright v. Witt*, 469 U.S. 412, 426 (1985). Courts may only remove from capital sentencing juries those jurors whose views "would prevent or substantially impair the performance of their duties ***in accordance with their instructions or their oaths***." *Id.* at 419-420, 424 (emphasis added), *citing* *Adams v. Texas*, 448 U.S. 38, 45 (1980). In deciding whether a juror is so impaired, courts must keep in mind the significance of a capital defendant's right to a fair and impartial jury. *Gray v. Mississippi*, 481 U.S. 648, 658 (1987). Indeed, as Chief Justice Rehnquist has put it:

> [N]ot all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986).

Adams, supra, provides a good example of how this standard is to be applied. Texas law required jurors to answer "statutory penalty questions," and affirmative answers to three such questions would result in an automatic death sentence. *Id.* at 41, n.1. Another statute required jurors to take an oath that "the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact." *Id.* at 42. "[A] number of prospective jurors" were struck because they were unable to take that oath. *Id.* Those jurors admitted that their deliberations would be affected, but they "apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." *Id.* at 49. Admitting that did not render those jurors "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. *Id.* at 51.

Similarly, admitting that she would be unwilling to serve as foreperson did not render Juror Tucker so irrevocably opposed to the death penalty as to frustrate the State's legitimate efforts in this case. Indeed, the State candidly conceded that Tucker was not opposed to the death penalty at all (Tr. 681). Tucker believes the death penalty is appropriate in some cases, e.g., first-degree murder (Tr. 679). She would consider it and she could recommend it (Tr. 622, 680). She simply did not want to serve as foreperson. And, as the State candidly conceded, jurors are "***never required***" to serve as foreperson (Tr. 751, 765-766, 814, 847) (emphasis added). No law, instruction or oath requires jurors to agree to accept the role of foreperson. *Kreutzer, supra*. The record before this

Court simply does not provide a "definite impression" that Tucker could not faithfully and impartially apply the law, follow the instructions and obey her oath.

Nevertheless, this Court has held that "[a]n uncompromising statement by a juror that he or she refuses to sign a death warrant ***hints at an uncertainty*** underlying the juror's determination to consider the full range of punishment." *State v. Smith*, 32 S.W.3d 532, 545 (Mo.banc 2000) (emphasis added). A standard of disqualifications of jurors based upon "hints at an uncertainty" contravenes *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and its progeny. A ***hint*** of uncertainty may warrant removal by a party with a peremptory, but it is not the constitutional standard for disqualification. Steadfast opposition to the death penalty "hints at an uncertainty," too, but such jurors are not subject to removal for cause so long as they can suspend their personal view and apply the law as given in their instructions. *McCree, supra* at 162. No where is it more clear that "hints at an uncertainty" do not warrant removal that in *Adams, supra*, which contains the genesis of the "prevent or substantially impair" standard. To remove jurors who admit that their deliberations would be ***affected*** by the possibility of a death sentence violates the United States Constitution. That an ***affected*** juror "would view [her] task 'with greater seriousness and gravity'" cannot disqualify her. *Adams*, 448 U.S. at 49. She is neither unwilling, nor unable to follow the law or obey her oath. *Id.* To strike such a juror unconstitutionally stacks the deck against Missouri's capital defendants. *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968); *Gray, supra* at 658.

Tucker was neither unwilling nor unable to follow the law or obey her oath. Further, her feelings about signing the death verdict were not even the "uncompromising"

refusals described in *Smith, supra*. Tucker testified: "I ***don't think I could*** sign" (Tr.620) (emphasis added); "***I wouldn't want to*** be the one to sign my name on that line" (Tr. 621) (emphasis added); "I ***don't want to*** sign the paper" (Tr. 621) (emphasis added); "It's ***unlikely that I would*** sign that paper" (Tr. 622) (emphasis added); "***just didn't want to*** sign the verdict" (Tr. 681) (emphasis added); "still ***wouldn't want to*** sign the form (Tr. 681) (emphasis added). Like the jurors in *Adams*, Tucker simply acknowledged that she would view her task with great seriousness and gravity. That cannot disqualify her. The State badgered her, trying to transform this into an unwillingness to consider death, but Tucker would not let him even transform her views into a steadfast refusal to sign the verdict:

> MR. CRANE (the prosecutor): Okay. But I think in a given case you could recommend death, follow the procedure, hold the State to the right burden, no more, no less?
>
> VENIREMAN TUCKER: Probably, if I heard all the evidence.
>
> MR. CRANE: Well, you would.
>
> VENIREMAN TUCKER: Then I might be able to, but –
>
> MR. CRANE: But it's unlikely?
>
> VENIREMAN TUCKER: Yeah.
>
> MR. CRANE: It's unlikely that you would come back with a verdict of death?
>
> VENIREMAN TUCKER: It's unlikely that I would sign the paper.

(Tr. 622). This is not an "uncompromising" refusal.

Even if *Smith, supra* can co-exist with *Adams, supra*, Tucker's responses do not disqualify her. Her answers clearly demonstrate her willingness to follow the law. At most, her reluctance to sign a death verdict expresses simply a conscientious or religious scruple that will affect her deliberation, but not prevent her legitimate consideration of both penalties. Such scruples do not disqualify her. *Witherspoon*, 391 U.S. at 522. Jurors cannot even be excluded for admitting that there are some kinds of cases for which they could not impose a death sentence. *Id.* at 622, n. 21. To permit broader exclusion than this "unnecessarily narrows the cross section of venire members [and] 'stack[s] the deck against the petitioner.'" *Gray*, 481 U.S. at 658-659. "To execute [such a] death sentence would deprive him of his life without due process of law." *Id.*

This Court cannot sanction the disqualification of Juror Tucker without straying even further away from *Adams* and *Gray*, which would vastly expand the scope of disqualification and stack the deck against capital defendants. Cases like *Smith, supra*, cannot be rectified with the standards enunciated by the United States Supreme Court. In *Alderman v. Austin*, 663 F.2d 558, 563 (5th Cir. 1981), the Fifth Circuit "reject[ed] the State's suggestion that service as foreperson is among every juror's duties." A given juror's willingness to serve as foreperson is immaterial to her qualification to sit on a capital jury. *Id.* The *en banc* Fifth Circuit affirmed this holding and vacated Alderman's death sentence. *Alderman v. Austin*, 695 F.2d 124, 126 (5th Cir. 1983) (en banc). This Court should overrule *Smith* and recognize that being a foreperson is immaterial to whether a juror is qualified under *Witherspoon* and its progeny.

Jurors like Tucker, who unequivocally believe that death is an appropriate punishment and who would consider and could impose that punishment, cannot be excluded simply because they ***would not want to*** be the one who had to sign the death verdict. Tucker never wavered that death is an appropriate punishment for first-degree murder.

In sustaining the State's strike, the trial court asserted that "Ms. Tucker…was very questionable whether she could impose the death penalty or not." (Tr. 705). The trial court necessarily dissected Tucker's responses, considering them out-of-context. Viewed in their entirety, Tucker's responses simply do not support the trial court's assertion. For example, the State asked, "Would your views on the death penalty ***substantially impair*** your ability to consider that, legitimately consider that punishment?" (Tr. 623) (emphasis added). Tucker replied, "Yeah." (Tr. 623). This is a legal conclusion. Tucker has no reason to know what is meant by "substantially impair." More to the point, though, Tucker "may not be the judge of h[er] own qualifications." *Rickenbaugh v Chicago, R.I. & P.R. Co.*, 446 S.W.2d 623, 626 (Mo. 1969).

A more appropriate question for Tucker was the one the State had posed moments earlier: "Would your views on the death penalty ***make it difficult for you to consider*** that option, death, as an appropriate punishment?" (Tr. 621) (emphasis added). Tucker replied, "I don't think so…" (Tr. 621). She explained that while she has reservations about the propriety of taking a life, she could do it if she were on the jury (Tr. 621).

The State will likely invite this Court to hold that, even if Tucker can't judge her own qualifications, these two responses exhibit equivocation which warrant her

disqualification. Of course, that belies the State's later ***concession*** that Tucker believes death is an appropriate punishment for first-degree murder (Tr. 679-681). This Court would have to ignore such precedent as *Gray, supra*, as well as the record, to find that Tucker's responses demonstrate a disqualifying bias.

In *Gray*, Juror Bounds "[could not] make up her mind," she "[was] totally indecisive ... say[ing] one thing one time and one thing another." 481 U.S. at 655, n. 7. "[S]he ultimately stated that ***she could consider the death penalty in an appropriate case***...." *Id*. at 653 (emphasis added). Certainly, Bounds' "somewhat confused" answers showed some equivocation that "hint[ed] at an uncertainty." But, that *did not disqualify* her! The United States Supreme Court held, "[She] was ***clearly qualified*** to be seated as a juror under the *Adams* and *Witt* criteria." *Id.* at 659 (emphasis added).

"[T]he decision whether a man lives or dies must be made on scales that are not deliberately tipped toward death." *Witherspoon*, 391 U.S. at 521-522, n. 20. After all, capital juries have vast discretion to decide whether and when death is "the proper penalty." *Id.* at 519. A juror's general views about the death penalty inevitably contribute to this decision, and "[a juror] who opposes the death penalty, ***no less than one who favors it***, can make the discretionary judgment entrusted to [her] by the State and can thus ***obey the oath*** [s]he takes as a juror." *Id.* (emphasis added).

Tucker believes that death is appropriate. She would consider it, and she could impose it. She simply would not want to sign the verdict. She would not frustrate any legitimate State interest to administer its capital sentencing scheme. *Smith's* "hints at an uncertainty" standard cannot withstand constitutional scrutiny. It contradicts every

United States Supreme Court decision applying *Witherspoon*. *Smith* suggests that, faced with facts identical to *Adams* and *Gray*, this Court would affirm. That cannot be.

This Court cannot condone Tucker's disqualification. *Witherspoon* is rooted in the constitutional right to an impartial jury. *Witt*, 469 U.S. at 416. Thus, the structural error caused by her disqualification cannot be discarded as harmless. *Gray*, 481 U.S. at 668. This Court must reverse Deandra's death sentences and remand for a new penalty phase trial.

IV. Stacking the Deck: Seating Juror Waggoner

The trial court abused its discretion in refusing Deandra's motion to strike Juror Waggoner for cause because that ruling deprived Deandra of his rights to due process, a fair and impartial jury and to be free from cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. Waggoner testified that he would expect the defense to present evidence to convince him that life without parole was the appropriate sentence. Later, he volunteered a clarification, emphatically stating, "So if the defense did absolutely nothing, if the prosecutor convinced me that this person was – had did the crime, it would be death. *I would not consider life without parole and put the expense on the taxpayers*." Waggoner sat on Deandra's jury.

Juror Waggoner could consider life without parole and death (Tr. 766) – unless the defense presented nothing. In that event, he "would not consider life without parole" (Tr. 790). For Waggoner, the sentencing decision was something of a profit/loss report. If he heard no evidence from the defense, he categorically would not consider life and "put the expense on the taxpayers" (Tr. 790). In overruling Deandra's motion to strike Waggoner, the court ignored his predilection for death (Tr. 799; Supp.L.F. 24), thereby denying Deandra due process and a fair and impartial jury and subjected him to cruel and unusual punishment.

"It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S.

81, 85 (1988). When measuring the impartiality of a juror, courts must determine "whether the juror's views [on capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'" *Id.*, *citing* *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). As fully discussed in Point III, *supra,* the trial court has broad discretion to determine whether a given juror is qualified. *State v. Clayton*, 995 S.W.2d 468, 475 (Mo. banc 1999). The court, however, has no discretion to let an automatic proponent of death be seated on a capital jury. *Ross, supra*; *Morgan v. Illinois*, 504 U.S. 719, 727-729 (1992).

The jurors at in *Ross* and this case are indistinguishable. There, Juror Huling could vote for life imprisonment in an appropriate case. *Ross, supra* at 83. But an appropriate case would not be one where Huling had found Ross guilty. *Id.* at 83-84. Once Huling had been convinced of Ross's guilt, "he would vote to impose death automatically." *Id.*, 487 U.S. at 84. Based on this, Huling was not qualified to sit on Ross's jury. The United States Supreme Court would have reversed Ross's death sentence had Ross not removed Huling with a peremptory strike. *Id.* at 85, 91, *reiterated by* *Morgan, supra* at 28-729.

Here, Juror Waggoner likewise could consider life without parole in an appropriate case (Tr. 766). Just like Huling, however, an appropriate case for life, according to Waggoner, did not include one in which Waggoner had been convinced of Deandra's guilt (Tr. 790). Once convinced of Deandra's guilt, absent defense evidence convincing him otherwise, Waggoner "would not consider life without parole and put the expense on the taxpayers." (Tr. 790). Unlike Huling, however, Juror Waggoner sat on

the final jury (L.F. 319). His dogmatic view "stacked the deck against [Deandra].'" *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968); *Gray v. Mississippi*, 481 U.S. 648, 658-659 (1987). This Court must reverse Deandra's death sentences.

Deandra moved to strike Waggoner (Tr. 798). The State objected, but admitted, "I'm not going to be able to tell you I remember what he just said right there. I just flat can't do it." (Tr. 799). As the following excerpt illustrates, the trial court remembered only part of Waggoner's position:

> THE COURT: Mr. Waggoner did hold up his hand when the initial question was asked.
>
> MR. CRANE: Which one?
>
> THE COURT: The initial question about: Would you require the defendant to come forward with some evidence?
>
> MR. CRANE: That was "expect," Judge.
>
> THE COURT: But then Ms. Jirard went back to that particular juror and the juror very clearly said that he could consider both punishments, even after his answer.
>
> MR. CRANE: But the first question was: Would you "expect," not would you "require."
>
> THE COURT: I'm going to overrule that one.

(Tr. 799, *referring to* Tr. 784, 789).

The trial court overlooked a critical response that crystallized Waggoner's position. Immediately after saying he could consider both life and death, Waggoner

heard Juror Hawkins proclaim: "If the defense did absolutely nothing, it would be a waste of time of the jury to be there, is my feeling." (Tr. 789). Waggoner ***immediately volunteered*** a clarification of his own position: "So if the defense did absolutely nothing, if the prosecutor convinced me that this person was – had did the crime, ***it would be death***. ***I would not consider*** life without parole and put the expense on the taxpayers." (Tr. 790) (emphasis added). Juror Hawkins, then chimed in with his agreement, "Right." (Tr. 790). The court rightly struck Hawkins, but refused to strike Waggoner (Tr. 799, 801-802). This Court must reverse.

In *State v. Divers*, 681 So.2d 320 (La. 1996), the Louisiana Supreme Court addressed similar juror bias. There, Jurors Pritchard and Honea announced that, in cases of deliberate murder, the punishment should be the death penalty. *Id.* at 325-326. **Juror Pritchard** first doubted that he could set aside his personal view. *Id.* at 325. Upon further inquiry by the defense, however, Pritchard said he ***thought*** he would be able to set his views aside and follow the law, but he just could not guarantee it. *Id.* The trial court erroneously refused to strike Pritchard for cause, causing the Louisiana Supreme Court to reverse. *Id.*

Juror Honea would not consider life without parole unless the defense presented mitigating evidence. *Id.* at 326. Soon after Honea said this, however, the court instructed the venire "concerning sentencing hearings and jury findings for death sentences." *Id.* When asked, Honea said she could follow those instructions. *Id.* The trial court erroneously overruled Divers' motion to strike Honea for cause, and the Louisiana Supreme Court reversed. *Id.* at 327.

Juror Waggoner and Juror Honea hold virtually identical views. Death is appropriate and they will not consider life ***unless*** the defense offers mitigating evidence showing that life would be appropriate. Waggoner would expect the defense to do this (Tr. 784). Although he responded "correct" to the State's leading question that he would not hold it against Deandra if no mitigating evidence was presented (Tr. 789), immediately, thereafter, he ***volunteered*** that if the defense presented no evidence, he "would not consider life without parole and put the expense on the taxpayers (Tr. 790). Such a burden may not be imposed on a defendant. *See*, *e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 703-704 (1975).

The trial court stacked the deck, creating a jury that lacked impartiality. The court is to remove jurors on either end of the spectrum, i.e., jurors who would not consider life and jurors who would not consider death. *Morgan, supra* at 734, n.7 (citation omitted). Here, the trial court did much more. First, over objection, it removed Juror Tucker, who unequivocally agreed that death is an appropriate punishment for first-degree murder and who would consider it and could impose it (Tr. 621-622, 680-681); *see* Point III, supra. Next, over objection, the court seated Juror Waggoner, who would not consider life without parole unless the defense presented mitigating evidence. This Court must reverse and remand for a new penalty phase trial.

V. Improper Evidence: Linking Deandra to 9/11

The trial court plainly erred, resulting in manifest injustice, in failing to declare a mistrial *sua sponte* after the State linked Deandra to 9/11 because that ruling deprived Deandra of due process, a fair trial before a fair and impartial jury and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends., V, VI, VIII, XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. First, the State asked Dr. Poch whether Deandra had notified jail personnel in August 2001 that he was changing his religion to Muslim. Then, when Dr. Poch acknowledged this, the State asked, "Would his ability to keep up with current events in any way be impaired as a result of all these problems you say he's got?" Neither question had any relevance to this case. By connecting Deandra's conversion to Islam to "current events," the State could only have wanted to fan the flames of prejudice by linking Deandra to terrorism; after all, Dr. Poch testified just two days after the six month anniversary of 9/11.

Deandra's jury began hearing the State's evidence against him on March 11, 2002 (Tr. v). Two days later, the State conjured up images of 9/11, while linking Deandra to that devastating tragedy. Meanwhile, the nation had paused to mark the six month anniversary of the worst terror attack it had yet experienced. *See Six Months After Sept. 11, America Reflects,* on NPR.org at http://www.npr.org/news/specials/sixmonths/. Governor Pataki recalled that we had seen "the worst of mankind…the face of evil." *See 'Tribute in Light,' bells mark 6-month anniversary* JSOnline, available at

http://www.jsonline.com/news/attack/mar02/26593.asp. The "Tribute in Light" emphasized the solemnity of this anniversary:

See Coping.org at http://www.coping.org/911/6month/6month.htm.

> "Half a year ha[d] passed since jets hijacked by terrorists crashed into the World Trade Center, the Pentagon and a Pennsylvania field. At this grim anniversary, NPR News report[ed] on Americans' countless steps toward recovery -- compensating the terror victims and restoring the crash sites, ***resisting anti-Islam backlash*** and replenishing the ranks of firefighters -- and always, remembering those who were lost."

See NPR.org at http://www.npr.org/news/specials/sixmonths/ (emphasis added).

The Boone County Prosecutor, on the other hand, showed no compunction about stirring Deandra's jurors into an anti-Islam backlash. While cross-examining Deandra's expert, Dr. Poch, the Prosecutor attacked Dr. Poch's credibility and opinions (Tr. 2215-2314). He interrupted that attack, however, with the following:

> Q. Okay…Did you -- Now, I guess did you get the record where he indicated, in August of 2001, that ***he was notifying jail personnel that he was changing his religion to that of Muslim***?
>
> A. I think I recall that.

Q. Would his ability to ***keep up with current events*** in any way be impaired as a result of all these problems you say he's got?

A. Not necessarily.

Q. He could read, ***he could know what's going on in the outside world***?

A. Correct.

(Tr. 2315) (emphasis added).

This Court vests broad discretion in the trial court's decision to admit evidence. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo.banc 1993). Before admitting evidence, trial courts must decide (1) whether the evidence is logically relevant (does it tend to prove or disprove a fact in issue?) and (2) whether it is also legally relevant (does its probative value outweigh its prejudicial effect?). *Id.* Evidence that diverts the jury's attention or causes "prejudice wholly disproportionate" to its logical relevance should be excluded. *State v. Rousan*, 961 S.W.2d 831, 848 (Mo.banc 1998). The ultimate question is whether the trial court admitted evidence that tended "to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Here, it did, thereby denying Deandra his rights to due process, a fair trial before a fair and impartial jury and subjected him to cruel and unusual punishment.

There was no dispute that Deandra shot and killed three people. The dispute focused on his mental state, and Deandra's desire to convert to Islam bore no relevance on that, or any other issue. It did certainly did not tend to prove that Deandra deliberated.

Nor did it tend to show his motive, intent, absence of mistake/accident, common plan, identity or signature with respect to the charged offense. *Bernard, supra*. It simply enticed the jury to find Deandra guilty of first-degree murder rather than second-degree murder on a ground far removed from proof of his guilt. This inquiry could only have sought to stir the white-hot emotions evoked by 9/11 to invite an anti-Islam backlash against Deandra. Worse, understanding the rule of recency, the Prosecutor waited to spring this on the jury until the end of his very lengthy (100+ page) cross-examination of Dr. Poch. He made sure he ended with a bang.

> At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted.

Viereck v. United States, 318 U.S. 236, 248 (1943).

In *Viereck*, the prosecutor invoked the horrors of World War II. Here, he fanned flames fueled by the War on Terrorism. Unfortunately, defense counsel did not object, but that does not relieve the trial court of its duty to ensure a fair trial. *State v. Tiedt*, 206 S.W.2d 524, 526 (Mo.banc 1947). "[T]he trial judge should have stopped counsel's discourse without waiting for an objection." *Viereck*, 318 U.S. at 248. This Court must correct this error, or manifest injustice will result. Rule 30.20.

> "The [Prosecuting] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a

> criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. ***It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one***."

Viereck, 318 U.S. at 248 (emphasis added), *quoting* *Berger v. United States*, 295 U.S. 78, 88 (1935). This Court cannot give its imprimatur to such inflammatory appeals. It should reverse Deandra's convictions and sentences and remand for a new trial.

VI. The State Opened the Door to "*Life Means Life*"

The trial court abused its discretion in refusing to admit Defense Ex. U, a video entitled "*Life Means Life,*" which depicts life at Potosi Correctional Center and plainly erred in not declaring a mistrial when the State argued the lack of evidence about life in a maximum security prison like Potosi because those rulings violated Deandra's rights to due process, present a defense and a fair trial, and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. After successfully objecting to Ex. U, the State belittled the defense description of prison as oppressive, arguing, "Is that what you've heard about today?" Having elicited that inmates in county jail enjoy such luxuries as recreation, television, and even delivery pizza, the State implied that aptly described life in prison as well: "He can cruise around in a big room there with his buddies" and enjoy "TV, meals, plenty of recreation *whenever he wants it.*" If left uncorrected, these errors will cause a manifest injustice.

Deandra's attorneys sought to play a video tape—entitled "*Life Means Life*"—for the jury (Tr. 2550-2553; Supp.L.F. 42). This very short video depicts the stark reality of life at Potosi Correctional Center (Ex. U). The State objected, describing it as "basically a video about the security measures and the extent of security at the Missouri State Correctional Center in Potosi, which is where most of the life without parole inmates are at least initially sent." (Tr. 2550). The court sustained the objection because, "I know of situations in the last year where the governor has been asked to commute sentences of

people doing life without parole." (Tr. 2553); *compare* Point VI, *infra*. The court's ruling violated Deandra's rights to due process, present a defense and a fair trial, and subjected him to cruel and unusual punishment. Returning to the issue at the end of the case, the court maintained its prior ruling (Tr. 2650).

Trial courts have broad, but not unfettered, discretion in deciding whether to admit evidence. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo.banc 1993). Here, the trial court exercised its discretion to exclude defense evidence based on its opinion that a sentence of life without parole did not necessarily mean Deandra would spend the balance of his natural life in prison (Tr. 2553). The trial court abused its discretion in basing its decision on this speculative fear. After all, it could not let the jury hold such a misapprehension. *Simmons v. South Carolina*, 512 U.S. 154, 168-169, 171 (1994).

Its reasoning aside, the trial court's initial ruling may have survived review but for the State's subsequent actions since Exhibit U does not relate to Deandra's individual characteristics. *State v. Kleypas*, 40 P.3d 139, 264 (Kan. 2001) (citation omitted). The living conditions of a maximum security prison do not tend to establish a mitigating circumstance. *Id.* at 265. Evidence of those conditions, however, may be made relevant when the State implies "that life in prison is in fact easy." *Id.* Here, the State did just that, and, when it re-visited the issue at the end of the case, the court should have let Deandra play Exhibit U for the jury (Tr. 2650). Due Process demands that the defense be able to rebut, explain or deny prosecutorial assertions. *Kleypas, supra* (citation omitted); *accord Gardner v. Florida*, 430 U.S. 349, 362 (1977). Yet, here, the trial court precluded Deandra from doing so.

The State used jailers from Boone and Callaway Counties to imply that all incarceration is something close to an all-expenses-paid vacation. "[T]he inmates aren't in a cage with bars…" (Tr. 2587). "They can hang out, move about, watch TV, read, talk to each other" (Tr. 2591, 2595). They can play card games (Tr. 2591). They get recreation (Tr. 2587). They can use the telephone (Tr. 2595). Occasionally, they even get to order delivery pizza (Tr. 2631). While these jailers could only describe life in their county facilities and not life in a maximum security prison, the State blurred that distinction, arguing:

> Prison is what they want. The defense attorney called it oppressive tyranny of the penitentiary. Is that what you've heard about today?
>
> He can cruise around in a big room there with his buddies, who he gets along with real good, the other inmates. He can chat with the guards, you know. He doesn't hit on those other inmates, you know. They're not like Angela. No, he's -- he's doing real well in there: TV, meals, plenty of recreation whenever he wants it.

(Tr. 2674).

The State's assertions that life in prison is easy are ridiculous. Worse, they are not true. "*Life Means Life*" would have shown jurors that, as an inmate at Potosi, Deandra would not get anything, let alone recreation, "whenever he wants it." (Ex. U). The video would have shown jurors that Potosi controls the movement of its inmates 24 hours a day, seven days a week (Ex. U). All inmates are always accounted for (Ex. U). In the unlikely event that the prison loses track of an inmate, it can lock-down the facility within

minutes (Ex. U). The prison is surrounded by a double fence, razor wire and electronic sensors (Ex. U). The perimeter is patrolled 24 hours a day, seven days a week, 365 days a year (Ex. U). An armed "E-squad" stands ready to take control of the prison (Ex. U).

Deandra asked that his jury see this video, which shows the reality of life at Potosi. Even if the trial court's initial ruling could have been affirmed, its ultimate ruling cannot be. The State successfully blocked the jury's view of Ex. U and then, painted an entirely different picture than the one the jury would have seen in Ex. U. A jury cannot be asked to decide whether to impose death on the basis of information that Deandra had no opportunity to refute, explain or deny. *Gardner, supra*. Had Deandra's jury known the truth, it may well have opted to spare his life and condemn him to a life of constant surveillance. This Court should reverse and remand for a new penalty phase.

The State compounded the erroneous exclusion of Exhibit U when it argued, "Prison is what they want. The defense attorney called it oppressive tyranny of the penitentiary. **Is that what you've heard about today**?" (Tr. 2674) (emphasis added). No, that is not what the jury heard because the State had successfully excluded Exhibit U. "It is well-settled in Missouri that it is error for a prosecutor to 'comment on or refer to evidence or testimony that the court has excluded.'" *State v. Weiss*, 24 S.W.3d 198, 202 (Mo.App., W.D. 2000), *quoting* *State v. Hammonds*, 651 S.W.2d 537, 538-539 (Mo.App., E.D. 1983); *accord* *State v. Luleff*, 729 S.W.2d 530, 535 (Mo.App., E.D. 1987). Though counsel did not object to this argument, manifest injustice will result unless this Court corrects the error. Rule 30.20.

In *Weiss*, 24 S.W.3d at 200, the defense tried to introduce evidence showing that Weiss received and deposited "buy-out" money in 1994. When Weiss withdrew money in 1997, he thought he was accessing the "buy-out" money. *Id.* He did not know he was withdrawing money from someone else's account. *Id.* The State objected to the admission of the "buy-out" money evidence, and the court excluded it. *Id.* at 200-202. In closing argument the prosecutor made "positive misrepresentations" that Weiss did not have evidence of the "buy-out" money. *Id.* at 203. Thus,

> it appears from his later conduct, he did not want the jury to know that Defendant was trying to introduce these documents because he wanted to argue that the fact that Defendant did not introduce them meant that they did not exist. This makes the prosecutor's conduct even more improper here.

Id. at 204.

The same is true here. The State objected to the video outside the hearing of the jury (Tr. 2550).[12] The jury had no idea that the defense had any evidence showing that life in prison was anything other than what the State asserted. While trial counsel did not object to "this distasteful tactic," it has been uniformly denounced as causing manifest injustice. *Weiss*, 24 S.W.3d at 204; *accord quoting Hammonds, supra*; *accord Luleff, supra*. The State manipulated the evidence and contorted reality, portraying life in prison as easy when it had excluded evidence that shows the contrary to be true. This Court cannot give this distasteful tactic its imprimatur.

[12] The jury retired at Tr. 2536; it returned at Tr. 2553.

Death is different. *Deck v. State*, 68 S.W.3d 418, 430 (Mo.banc 2002) (citation omitted). It carries with it a need for heightened reliability in determining that death is appropriate. *Id.* The State's argument, here, makes that reliability impossible. If left uncorrected, manifest injustice will result. Thus, this Court should reverse and remand for a new penalty phase trial.

VII. Refused to Answer: Will He Ever Get Released?

The trial court plainly erred, resulting in manifest injustice, when it refused to answer after the jury asked whether Deandra would ever be released from a sentence of life without parole because that ruling violated Deandra's rights to due process, a fair trial before a properly instructed jury and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII, XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. After approximately three hours of deliberating, the jury asked the court how long life in prison would really be. The court replied, "I cannot answer your question. Please follow your instructions." The instructions, as given, had not made it clear to the jury that a sentence of life without parole means just that – life in prison without parole. The court left the jury to rely on its collective common sense that, after serving only 15 years on a life sentence, Deandra would be "out there doing the same thing."

First degree murder carries two possible punishments: "death or imprisonment for life without eligibility for probation or parole." §565.020.2. Nonetheless, the prevailing fear among laypersons is that a person convicted of first degree murder will be paroled to offend again. *Simmons v. South Carolina*, 512 U.S. 154, 159 (1994) (92.9% of all jury-eligible adults feared that a murderer serving life imprisonment in South Carolina actually would get parole). Not even trial courts are immune to this misunderstanding – Judge Hamilton excluded "*Life Means Life*," opining that Deandra may not spend his entire life in prison even if sentenced to life without parole (Tr. 2553). For the vast majority of laypersons, the fear of parole is either "extremely" or "very" important in

deciding "between life and death." *Id.* To compensate for these fears of future leniency, jurors seem willing to deal with a given defendant more harshly than they otherwise would. *Id.; see also Smith v. State*, 317 A.2d 20, 25 (Del. 1974); *Farris v. State*, 535 S.W.2d 608, 614 (Tenn. 1976).

This prevailing fear surfaced as this jury deliberated whether to spare Deandra's life or condemn him to death. After deliberating for nearly three hours, the jury sent a note asking the court how long Deandra would serve on a life sentence (Tr. 2678-2680; Ct.Ex.D). The court made the following record:

> THE COURT: Let the record reflect it's now 12 minutes till 7:00. We have a note from the jury which the court reporter will mark as D.
>
> MR. CRANE: That looks good for you.
>
> THE COURT: I propose that I answer that by saying: I cannot answer your question. Please follow your instructions.
>
> Any objection to that?
>
> MR. CRANE: No.
>
> MR. CATLETT: Yeah, I think that's what you got to do. I was trying to think of a better answer but I can't come up with one.
>
> MS. JIRARD: What's wrong with "no"?
>
> MR. CRANE: Is that all you need, Judge?
>
> THE COURT: Just a second. Let me finish. I have written a note which says: "I cannot answer your question. Please follow your instructions." Signed by me.

Agreeable?

Okay. Deliver that to the jury without comment.

(Tr. 2680-2681). The court's refusal to address the jury's misunderstanding of the law violated Deandra's rights to due process, a fair trial before a properly instructed jury and subjected him to cruel and unusual punishment.

Of course, this Court has held that the instructions make parole ineligibility clear to capital juries. *State v. Smith*, 32 S.W.3d 532, 545 (Mo.banc 2000), *citing* *State v. Feltrop*, 803 S.W.2d 1, 14 (Mo.banc 1991). *State v. Thompson*, 85 S.W.3d 635, 638-642 (Mo.banc 2002), however, illustrates the very real and tragic consequences when jurors are confused by the instructions. *Smith*, *Feltrop* and their progeny should be overruled because they ignore reality. After all, if the instructions made parole ineligibility clear to Deandra's jurors, why did they ask what that sentencing option means? Had the jury understood the "plain meaning" of the sentence, it would not have asked about Deandra's parole eligibility. *Simmons*, 512 U.S. at 170, n.10. This Court cannot simply pretend that the instructions make something clear when the jury affirmatively states its uncertainty. "When a jury makes explicit its difficulties a trial judge should clear them away with ***concrete accuracy***." *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946) (emphasis added).

Nearly two-thirds of the states with life imprisonment without parole as an alternative to death "inform the sentencing authority of the defendant's parole ineligibility." *Simmons*, 512 U.S. at 167 and n. 7. Like Missouri, Alabama simply identifies the sentencing options as "death and life without parole." *Id.* Nonetheless, "in

response to confusion during voir dire regarding the meaning of 'life without parole,' [an Alabama trial court tried] to explain that term." *Jackson v. State*, 791 So.2d 979, 1003 (Ala.Crim.App. 2000). A prospective juror wanted some assurance that there would not be any "technicalities" that would let Jackson get paroled if he received life without parole. *Id.* The trial court explained that there are no "guarantees" in life, but "specifically stated that 'as much as I can guarantee anything, life without parole means life without parole.'" *Id.* This was a proper explanation and did not diminish the jury's sense of responsibility. *Id.*

> Without some instruction by the judge, there is no reason to assume that the jury will know the sentence of life imprisonment without parole will mean that a defendant will be ineligible for parole for the balance of his natural life. It is universally recognized ***that the literal words of a sentence to imprisonment are generally not an accurate indication of the effect of the sentence***. It is common knowledge that a ten year sentence does not mean that the prisoner will serve ten years in prison, and it is also common knowledge that a life sentence does not mean that a prisoner will serve the balance of his natural life in prison. There is no reason for jurors to assume, unless told, that "life without the possibility of parole" means that a prisoner will never be eligible for parole.

Bruce v. State, 569 A.2d 1254, 1268-1269 (Md.App. 1990) (emphasis added).

The *Bruce* court observed that jurors may conclude that even a sentence of life imprisonment without parole could result in an early release, and thus not adequately punish the defendant. *Id.* at 1268. To guard against this and ensure a fair weighing of

whether death is appropriate, the jury is entitled to know whether parole is possible. *Id.* (citation omitted). Had Bruce's jury been told that he would serve the balance of his natural life in prison without ever being paroled, it may have concluded that such a sentence was an adequate punishment, mitigating against the death penalty. *Id.* at 1269. Thus, his death sentence had to be reversed. *Id.*

Missouri does not instruct the jury on the meaning of life without parole. It simply attaches that label to one of the sentencing options for first-degree murder. That is not enough. Deandra's jury clearly did not understand that this label means precisely what it says, and it asked for clarification (Supp.L.F. 12). Had the court instructed the jury that Deandra would ***never*** be eligible for parole, it may well have chosen to spare his life.

While trial counsel initially acceded to the trial court's proposed response, co-counsel immediately offered an alternative – i.e., "no" (Tr. 2681). This short response would have accurately stated the law, and it should have been given so that the jury's decision could rest on accurate information and not speculative fears. Since this issue is not presented in Deandra's motion for new trial, he asks for plain error review. Rule 30.20. Distinguishing death from all other sentences, the Missouri General Assembly imposed on this Court the duty to review "any errors enumerated by way of appeal." Section 565.035.2. Since the Eighth Amendment imposes a heightened standard for reliability in deciding whether death is appropriate in a given case, "accurate sentencing information [is] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Simmons*, 512 U.S. at 172 (citation omitted).

Without accurate and clear guidance from the court, Deandra's jury "realize[d] that 15 years down the road, with good behavior, [such defendants] are out there doing the same thing." (Proportionality Exhibit A; Appendix __). This fear of future dangerousness is precisely why the United States Supreme Court requires trial courts to instruct the jury regarding parole ineligibility. *Simmons, supra*; *Kelly v. South Carolina*, 534 U.S. 246, 255-257 (2002). This is manifestly unjust, and this Court should reverse.

VIII. *Ring v. Arizona*: Sentenced by Court

The trial court erred in sentencing Deandra to death because adhering to the dictates of §565.030.4(4) violated Deandra's rights to due process and a jury trial and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. First-degree murder is punished by imprisonment for life without parole *unless* a jury finds all essential facts necessary to impose death, i.e., that (a) at least one statutory aggravator exists for each murder, (b) the "facts and circumstances in aggravation…, taken as a whole" warrant death, and (c) the "facts and circumstances in mitigation" do not outweigh the "facts and circumstances in aggravation." Deandra's jury could not decide punishment, and rather than polling the jury to determine whether it had made these three factual findings, the trial court, pursuant to §565.030.4(4), began the deliberative process anew, made the three essential factual findings, *sua sponte*, and sentenced Deandra to death. Since this sentencing procedure is unconstitutional, §565.040.2 requires this Court to order Deandra be sentenced to life without parole.

Deandra never waived his fundamental right to submit his case to a jury. Indeed, Deandra objected to the court's imposing death when the jury had not made the requisite findings (L.F. 54-58; L.F. 437-440). Nevertheless, the trial court denied him that right, sitting as Deandra's judge and jury in penalty phase. While the trial court acted in accordance with §565.040.2, doing so violated Deandra's state and federal constitutional rights to due process and a jury trial and subjected him to cruel and unusual punishment.

"The right to trial by jury reflects…'a profound judgment about the way in which law should be enforced and justice administered.'" *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), *quoting* *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *accord* *Ring v. Arizona*, 536 U.S. 584, __, 122 S.Ct. 2428, 2443 (2002). The framers of our Constitution installed the jury as the ultimate check against "oppression by the government." *Duncan* at 155. Deeming an independent judiciary insufficient by itself, the framers insisted upon juries to further protect the citizenry against arbitrary action. *Id.*

By the time the framers were drafting our Constitution, juries had assumed the power to determine both guilt and punishment. *Ring, supra* at 2438. "[T]he jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established." *Id.* (quotation omitted). This remained true in 2002, when the trial court instructed Deandra's jury that, to impose death, it had to find that:

a. "one or more…statutory aggravating circumstance[s] exist" (L.F. 357, 363, 369); and

b. "[the] facts and circumstances in aggravation…taken as a whole, warrant the imposition of death" (L.F. 358, 364, 370); and

c. "[the] facts and circumstances in mitigation of punishment… [do not] outweigh the facts and circumstances in aggravation" (L.F. 359, 365, 371).

Deandra's jury deliberated for over five hours, to no avail (Tr. 2678-2682). It announced that it had been "***unable to decide or agree*** upon the punishment" in any of the three counts

(L.F. 383-385) (emphasis added).

The court recessed briefly before returning to court and announcing its own findings of fact and imposition of death (Tr. 2684-2686). While the trial court may have adhered to the sentencing procedure created by §565.030.4(4), it violated Deandra's constitutional right to a jury trial. *Ring*, 122 S.Ct. at 2432. The Sixth Amendment to the Constitution promises all defendants that a jury will determine any fact enumerated by the Legislature as a condition precedent for increasing the maximum punishment. *Id.* The trial court broke this promise to Deandra. Deandra's jury did not announce any of the three findings necessary to enhance Deandra's punishment from life without parole to death.

The State, however, may seek refuge under pre-*Ring* cases like *State v. Smith*, 944 S.W.2d 901 (Mo.banc 1997). It certainly did in *State v. Joseph Whitfield*, No. SC77067. There, the State insisted that the jury need only find that an aggravating circumstance exists and that such a finding is inferable from a verdict that the jury cannot decide punishment. No other situation in criminal law lets a court infer a verdict when none exists. Death, to be sure, is different. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). But that difference requires ***greater***, not lesser, reliability. *Id.* The Prosecutor, here, seemed to understand this:

> MR. CRANE: Judge, do they need to write down the aggravating circumstances?
>
> THE COURT: No.
>
> MR. CRANE: Are you sure?

THE COURT: Jury returns at 8:44 p.m. with verdicts indicating they are unable to decide or agree upon the punishment in Counts I, II, and III.

(Tr. 2683). The court needed to conduct a specific polling of the jury to determine which, if any, of the three findings necessary to make death an available punishment the jury had made. *State v. Thompson*, 85 S.W.3d 635, 639-640 (Mo.banc 2002). Instead, it inferred that the jury had found all that it needed to find (Tr. 2684). Inferring verdicts destroys reliability. Indeed, this Court recently reversed a death sentence that the trial court had improperly imposed after making just this sort of inference. *Id.* at 640-642.

To the extent the State's wishful thinking could survive *Thompson*, it cannot and does not survive *Ring*.[13] A capital jury must find much more than simply an aggravating circumstance before death may be imposed. *"**[A]ny fact*** (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Ring* 122 S.Ct. at 2439 (emphasis added). A fact increases the maximum sentence when its absence renders the higher sentence unavailable. *Id.* Concurring in *Ring*, Justice Scalia explained it this way:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that ***all facts essential to the imposition of the level of punishment that the defendant receives***—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—***must be found by the jury beyond a reasonable doubt***.

[13] *Ring* applies to Deandra's case. *Griffith v. Kentucky*, 479 U.S. 314, 322-323 (1987).

Id. at 2444 (Scalia, J., concurring) (emphasis added).

So, in the absence of what facts, is death not an option? Or, stated differently, what are all the facts essential to imposing death in Missouri? The instructions answer this with unequalled clarity.

First, the jury must find that "one or more…statutory aggravating circumstance[s] exist[s]" (L.F. 357, 363, 369); MAI-CR3d 313.40. Whether a jury had to find the existence of an aggravating circumstance was the precise question addressed in *Ring, supra*. The jury must find this essential fact. *Id.* Without it, the only available sentence is life without parole. (L.F. 357, 363, 369); §565.030.4(1).

The next two steps require the jury to find the historical facts and then balance those facts in one way or another:

> **Step 2:** Do you find that "[the] facts and circumstances in aggravation…taken as a whole, warrant the imposition of death" (L.F. 358, 364, 370); MAI-CR3d 313.41A?
>
> **Step 3:** Do you find that "[the] facts and circumstances in mitigation of punishment … [are insufficient to] outweigh the facts and circumstances in aggravation" (L.F. 359, 365, 371); MAI-CR3d 313.44A?

The jury must answer "yes" to both of these questions or death is not an available punishment. (L.F. 358-359, 364-365, 370-371); §565.030.4(2)and(3). Appellant knows of no case answering whether these two steps involve essential facts under *Ring*, although

State v. Joseph Whitfield, No. SC77067[14] has presented the issue. At oral argument in *Whitfield*, the question arose whether Steps 2 and 3 simply involve a weighing process rather than a fact-finding. That question is best answered by *United States v. Gaudin*, 515 U.S. 506 (1995).

In *Gaudin*, the defendant was charged, *inter alia*, with making false statements. *Id.* at 506. The trial court refused to let the jury decide whether Gaudin's false statements were "material," concluding that "the issue of materiality is a matter for the court." *Id.* A unanimous United States Supreme Court reversed. *Id.* at 522-523. Deciding whether a statement is "material" necessarily involved subsidiary findings of purely historical fact. *Id.* at 512. "The materiality inquiry, involving as it does 'delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those facts to him…[is] peculiarly on[e] for the trier of fact." *Id.* (internal brackets in *Gaudin*) (citations omitted). The jury has a constitutional duty not simply to find the facts but to draw the ultimate conclusion from them. *Id.* at 514-515.

Steps 2 and 3 of Missouri's death penalty scheme are fact-finding steps that cannot be delegated to courts. Indeed, before drawing any conclusions at these two steps, the jury must ***first find the facts*** it views as either aggravating or mitigating. Clearly, these factual determinations are uniquely reserved for jurors and not judges. Only after the jury has ***found the facts*** in aggravation and in mitigation does it proceed to draw the ultimate conclusions by deciding whether the ***facts in aggravation*** "warrant" death and

[14] Argued January 7, 2003.

whether the ***facts in mitigation*** "outweigh" those in aggravation. These determinations are identical to deciding whether a statement is material; they are uniquely left for juries to make. *Gaudin, supra*.

Deandra's jury announced nothing more than its inability to reach a decision. It did not report whether it made the findings necessary to make death an available punishment. Of course, it had no vehicle to make such a report. The trial court had refused to submit the verdict forms Deandra proposed. *See* Point IX, *infra*. The court also refused the State's suggestion that the jury should be polled (Tr. 2683). Firmly adhering to §565.030.4(4), the trial court simply released the jury (Tr. 2683). This procedure vitiated any findings the jury may have made. *See Sullivan*, 508 U.S. at 281 (misstating the burden of proof "vitiates ***all*** the jury's findings.") (emphasis in *Sullivan*).

Although §565.030.4(4) vitiated ***all*** the jury's findings and mandated the trial court to start anew at Step 1, the trial court tried to resurrect the jury's findings by reviewing what it inferred the jury had done. Conducting such a review, a "court can only engage in pure speculation—its view of what a reasonable jury would have done…when it does that, 'the wrong entity judge[s] the defendant…" *Sullivan*, 508 U.S. at 281. Nevertheless, the trial court speculated that the jury found (a) that one or more statutory aggravating circumstances existed and (b) that the facts and circumstances in aggravation warranted death (Tr. 2684). As *Thompson, supra* illustrates, that speculation is unconstitutional. The trial court also ignored that Deandra is entitled to a jury finding at Step 3, since it, too, is essential to making death an available punishment.

Interestingly, the trial court did not rely on these assumptions when it imposed death. Understanding that §565.030.4(4) required it to begin anew at Step 1, the trial court did just that, announcing the following detailed findings of fact:

> THE COURT: …In reaching its conclusion, I have reviewed the evidence that I have listened to, as well as what the jury has listened to the last five days. ***The Court now makes the following findings***:
>
> As to Count I, ***the Court finds that the following statutory aggravating circumstances have been proven beyond a reasonable doubt***:
>
> 1. That the murder of Juanita Hoffman was committed while the defendant was engaged in the commission of another unlawful homicide of William Jefferson; and
>
> . 2. That the murder of Juanita Hoffman was committed while the defendant was engaged in the commission of another unlawful homicide of Angela Brown.
>
> ***The Court further finds beyond a reasonable doubt*** that there are ***facts and circumstances in aggravation*** of punishment which ***warrant*** the imposition of a sentence of ***death***, that ***the aggravating facts and circumstances outweigh the mitigating facts and circumstances***, and that the appropriate sentence on Count I is death.
>
> As to Count II, the ***Court finds that the following statutory aggravating circumstances have been proven beyond a reasonable doubt***:

1. That the murder of William Jefferson was committed while the defendant was engaged in the commission of another unlawful homicide of Juanita Hoffman; and

. 2. That the murder of William Jefferson was committed while the defendant was engaged in the commission of another unlawful homicide of Angela Brown.

The Court further finds beyond a reasonable doubt that there are ***facts and circumstances in aggravation*** of punishment which ***warrant*** the imposition of a sentence of ***death***, that ***the aggravating facts and circumstances outweigh the mitigating facts and circumstances***, and that the appropriate sentence on Count II is death.

As to Count III, ***the Court finds that the following statutory aggravating circumstances have been proven beyond a reasonable doubt***:

1. That the murder of Angela Brown was committed while the defendant was engaged in the commission of another unlawful homicide of Juanita Hoffman; and

2. That the murder of Angela Brown was committed while the defendant was engaged in the commission of another unlawful homicide of William Jefferson.

The Court further finds beyond a reasonable doubt that there are ***facts and circumstances in aggravation*** of punishment which ***warrant*** the imposition of a sentence of ***death***, that ***the aggravating facts and circumstances outweigh***

the mitigating facts and circumstances, and that the appropriate sentence as to Count III is death.

(Tr. 2684-2686; Appendix __) (emphasis added).

The wrong entity sat as Deandra's trier of fact. *Ring, supra*. Absent a valid waiver by the defendant, the Sixth Amendment forbids a judge from sitting as trier of fact regarding the essential elements that make death an available punishment. Yet, that is precisely what §565.030.4(4) requires the judge to do. Section 565.030.4(4) is unconstitutional. This Court must order that Deandra be sentenced to life without parole. §565.040.2.

IX. Refusing Verdicts Forms G, H, I

The trial court erred in refusing to submit Verdict Forms G, H, and I because that ruling violated Deandra's rights to due process, a fair trial before a properly instructed jury and subjected him to cruel and unusual punishment. *See* U.S. Const., Amends. V, VI, VIII and XIV; Mo. Const., Art. I, §§ 10, 18(a) and 21. *Apprendi v. New Jersey* made clear that all facts essential to making an enhanced sentence available must be found by a jury. When, as here, the jury cannot decide upon punishment, it returns a general verdict patterned after MAI-CR3d 313.58A, which does not disclose whether it found the essential facts. The modifications in proposed Verdict Forms G, H, and I, briefly, simply and impartially required the jury to announce the essential facts it had found.

The jury found that Deandra knowingly killed three people after coolly reflecting (L.F. 331, 335, 339, 349-351). If the jury found only these facts, Deandra's sentence would have to be life without parole. §565.030.4. Before death is an available sentence, the jury had to make three additional findings: (a) that at least one aggravating circumstance exists; (b) that the facts and circumstances in aggravation warrant death; and (c) that the facts and circumstances in mitigation do not outweigh those in aggravation. Id. The jury must find any fact on which the legislature has conditioned an increase in the maximum punishment. *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000); *see also* Point VIII, *supra*.

Deandra proposed Verdict Forms G, H, and I to give the jury a way to announce its findings on each of the three facts essential to making death an available sentencing option (Tr. 2652-2653):

VERDICT G[15]

> We, the jury, having found the defendant guilty of murder in the first degree, are unable to unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances submitted in Instruction No. ____ existed.

(L.F. 379; Appendix __).

VERDICT H

> We, the jury, having found the defendant guilty of murder in the first degree, unanimously have found the following aggravating circumstance or circumstances beyond a reasonable doubt:
>
> However, we are unable to unanimously find that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment.

(L.F. 380; Appendix __).

[15] The defense had preprinted these forms "E," "F," and "G." The court relabled them "G, H, and I" (Tr. 2653), however, the ACCO clip used to bind the Legal File has partially obscured the court's labeling (L.F. 379-381; Appendix __).

VERDICT I

We, the jury, having found the defendant guilty of murder in the first degree, unanimously have found the following aggravating circumstance or circumstances beyond a reasonable doubt:

We, the jury, further unanimously find that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment.

We, the jury, further do not unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances we have unanimously found.

However, we are unable to decide or agree upon the punishment.

(L.F. 381; Appendix __). The court refused these, submitting, instead, the general verdicts in MAI-CR3d 313.58A (Tr. 2652-2653). Deandra renewed this issue in his motion for new trial (Supp.L.F. 48-50). Refusing to submit these verdict forms violated Deandra's rights to due process, a fair trial before a properly instructed jury and subjected him to cruel and unusual punishment.

Ordinarily, an MAI pattern instruction or verdict form cannot be modified without itself creating a presumption of error. *Venable v. S.O.R., Inc.*, 713 S.W.2d 37, 40 (Mo.App., W.D. 1986). However, "it is also judicially recognized that MAI instructions

are not all encompassing and modification of MAI instructions may be appropriate under the facts of a particular case." *Id.* The jury, after all, must be instructed in a manner consistent with the substantive law. *State v. Carson*, 941 S.W.2d 518, 520(Mo.banc 1997). When the MAI pattern instructions, forms or Notes on Use conflict with the substantive law, they must be modified. *Id.*

The general verdict prescribed by MAI is contrary to the substantive law. A general verdict sufficed under *Walton v. Arizona*, 497 U.S. 639, 648(1990), which had concluded that the Sixth Amendment did not require specific findings of fact to authorize the imposition of death. The State is likely to argue that *Walton* remained viable until three months after Deandra's trial when the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). Such an argument, however, must fail.

Walton's death knell sounded three years before Deandra's trial. In *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999), the Court emphatically held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." As the *Jones* dissent recognized, *Walton* and *Jones* could not coexist. *Jones*, 526 U.S. at 271-272 (Kennedy, J., dissenting). *Walton* permitted the very thing *Jones* condemned as unconstitutional. *Jones*, 526 U.S. at 271-272 (Kennedy, J., dissenting).

One year after *Jones*, the Court, again, sounded *Walton's* death knell. In *Apprendi*, the Court reiterated that the State cannot expose a defendant to "a penalty ***exceeding*** the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 483 (emphasis in original). *Apprendi* emphasized that the

inquiry is not one of form, but of effect. *Id.* at 494. With *Walton* not expressly before the Court, the majority tried to distinguish it, but, as the *Apprendi* dissenters observed, that distinction was "baffling to say the least." *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting).

In *Ring*, the Court finally had the opportunity to confront *Walton* directly. The Court acknowledged that the substantive law had already changed. *Jones* and *Apprendi* had fully eviscerated *Walton*. *Ring*, 536 U.S. at ___, 122 S.Ct. at 2442-2443. *Ring* did not recognize a new right, it simply applied the right acknowledged by *Apprendi*. *Gay v. United States*, 2003 W.L. 168416, 1 (S.D.N.Y. 1/24/2003).

Since the MAI's cannot keep pace with every substantive change in the law, the trial court must modify those pattern instructions or verdict forms that do not accurately express the applicable substantive law. *Carson, supra*. Here, that required the trial court to modify MAI-CR3d 313.58A to reflect the substantive changes effected by *Jones* and *Apprendi*. Refused Verdict forms G, H, and I would have accomplished that. Those forms required the jury to indicate their decision regarding each of the three findings essential to making death an available sentencing option. Unlike the general verdict actually submitted, these proposed verdicts accurately stated the substantive law. And, as required of any modification to an MAI form, these verdicts used brief, simple and impartial language, "readily understandable by a jury composed of ordinary people." *Venable*, 713 S.W.2d at 40.

While prejudice is not presumed, it is certainly established. Since it received the general verdict forms contained in MAI, Deandra's jury could announce only that it could

not "decide or agree upon punishment" (L.F. 383-385). The trial court's refusal to submit Verdicts G, H, and I vitiated the jury's deliberations and stripped Deandra of his right to a jury trial on all facts essential to his punishment. *See* Point VIII, *supra*. This Court should reverse and remand for a new penalty phase trial before a properly instructed jury.

Proportionality

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability … that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *accord Deck v. State*, 68 S.W.3d 418, 430 (Mo.banc 2002).

De novo Review

Recognizing this difference, the Missouri Legislature requires this Court to conduct an independent review of all death sentences. §565.035. The Legislature mandates this review "to ***promote evenhanded, rational and consistent*** imposition of death sentences." *State v. Chaney*, 967 S.W.2d 47, 59 (Mo.banc 1998) (emphasis added). Evenhandedness, rationality and consistency are the hallmarks of *de novo* review. *Ornelas v. United States*, 517 U.S. 690, 696-698 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

Appellate courts must review civil punitive damage awards *de novo*. *Cooper Industries*, 532 U.S. at 431, *relying on Ornelas, supra*. While the states have broad discretion to determine what level of punitive damage is acceptable, they are constrained by the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment. *Id.* at 434. This is because punitive damage awards are used as "'private

fines' intended to punish the defendant and to deter future wrongdoing." *Id.* at 432. A punitive damage award violates the Eighth Amendment if it grossly excessive. *Id.* But "gross excessiveness" is a fluid concept that takes its substantive content from the particular context of the case. *Id.* at 436. An appellate court must conduct an independent review in order to "maintain control of, and to clarify, the legal principles." *Id.* *De novo* review unifies precedent and stabilizes the law. *Id.*

In deciding that punitive damage awards must be reviewed *de novo,* the Supreme Court relied on its death penalty jurisprudence. *Id.* at 433-435. *Cooper Industries* found that a jury's award of punitive damages is analogous to cases "involving deprivations of life." *Id.* It would be illogical to afford the full due process protection of *de novo* review to corporate defendants facing only monetary damages but withhold that protection from criminal defendants facing their execution. *State v. Black*, 50 S.w.3d 778, 794 (Mo.banc 2001) (Wolff, J, dissenting).

Proportionality review of death sentences is fluid. To ensure evenhandedness, rationality and consistency in the imposition of this ultimate punishment, this Court's review must be *de novo*. Indeed, the Legislature clearly intended *de novo* review when it mandated that this Court conduct an independent review of all death sentences. *Id;* §565.035. This Court is statutorily obliged to gather information enabling it to determine whether a given death sentence resulted from, *inter alia,* any arbitrary factor. §565.035.3(1). In each death penalty case, this Court must conduct a complete review that is "independent of the findings and conclusions of the judge and jury." *Chaney*, 967

S.W.2d at 59. Such a review of Deandra's case will disclose the unreliability and excessiveness of his death sentences.

Arbitrariness

Deandra's jury ignored the trial court's instructions and applied its own misconception that life imprisonment without parole would not result in Deandra being incarcerated for the balance of his natural life in prison. Some jurors related extraneous beliefs and assertions of fact, telling other jurors that Deandra would be out there doing the same thing again in just 15 years (Proportionality Exhibit A). This misconception swayed most of the jurors who had favored life without parole to reconsider and vote to impose death. *Id.* While this switch did not garner sufficient votes for the jury to impose death, it arbitrarily stripped Deandra of jurors willing to consider life as an appropriate punishment. This Court must not condone death sentences that result from any arbitrary factor. §565.035.3(1).

"The purpose of a jury is to guard against the exercise of arbitrary power…" *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). To achieve this purpose, however, "the jury [must] obey the instructions" it receives from the trial court. *Sparf v. United States*, 156 U.S. 51, 62, n.1 (1895). "[T]he judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions." *United States v. Gaudin*, 515 U.S. 506, 513 (1995).

"Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it." *United States v. Powell*, 469 U.S. 57, 66 (1984). They may not ignore or nullify the law. "Nullification is, by definition, a violation of a juror's oath to apply the

law as instructed by the court." *United States v. Thomas*, 116 F.3d 606, 614 (2nd Cir. 1997). Refusing to apply the law as set out in the instructions constitutes misconduct, warranting dismissal. *Id.* at 616.

Here, before voir dire even got under way, the court stressed to the veniremembers, "[T]here are issues of fact which must be decided by a jury, *subject to instructions* concerning the law which the Court will give to the jury. *The jury is obligated to follow those instructions."* (Tr. 406, 1006) (emphasis added); MAI-CR3d 300.02. After having the veniremembers sworn by the deputy clerk, the court continued reading MAI-CR3d 300.02, instructing the veniremembers, "It is *your duty to follow the law* as the Court gives it to you in the instructions, *even though you may disagree with it*." (Tr. 408-409, 1009) (emphasis added). Following voir dire, the court had the final jury sworn by the deputy clerk (Tr. 1225). The court then immediately instructed the jury, "It is *your duty to follow the law* as the Court gives it to you … *Faithful performance by you of your duties as jurors is vital* to the administration of justice." (L.F. 322; Tr. 1227) (emphasis added); MAI-CR3d 302.01; *accord* (Tr. 405, 1006). Later, the Court reminded the jury of its solemn duty to apply the law as given in the instructions (L.F. 353; Tr. 2466); MAI-CR3d 313.30A.

Then, pursuant to MAI-CR3d 313.31, the trial court instructed the jury, "The punishment prescribed by law for murder in the first degree is either death or imprisonment for life by the Department of Corrections without eligibility for probation or parole." (L.F. 354). And, finally, copious other instructions reiterated that the statutory alternative to death is "imprisonment for life by the Department of Corrections

without eligibility for probation or parole." (L.F. 357, 358, 359, 361, 362, 363, 364, 365, 367, 368, 369, 370, 371, 373, 374). The jurors did not apply this law. The jury did not understand that life without parole meant that Deandra would serve the balance of his natural life in prison. "[S]ome of the jurors talked about people they know of where life in prison just lasted 15 years…." (Proportionality Exhibit A).

This is a common fallacy. Indeed, the prevailing fear among laypersons is that a person convicted of first degree murder will be paroled to offend again. *See* *Simmons v. South Carolina*, 512 U.S. 154, 159 (1994) (92.9% of all jury-eligible adults feared that a murderer serving life imprisonment in South Carolina actually would get parole). The vast majority of laypersons (over 75%) agree that the fear of parole is either "extremely" or "very" important in their deciding "between life and death." *Id.* This certainly proved true for Deandra's jury.

After almost three hours of deliberating on Deandra's punishment, the jury asked the court, "Is there any circumstance under which he may ever be released from incarceration?" (Supp.L.F. 12; Tr. 2678-2680). The trial court responded, "I cannot answer your question. Please follow your instructions." (Tr. 2681). This response "made people realize that 15 years down the road, with good behavior, [Deandra would be] out there doing the same thing." (Proportionality Exhibit A). Consequently, most of the jurors who had favored life, switched positions and voted to impose death. *Id.* As Juror Waggoner put it,

> Most of them who were not sure about the death penalty, it was just whether or not he was going to get out, they didn't want him to get out if they put him in for life.

So some of the jurors talked about a few people that had gotten out that had life.

That is what took so long.

(Proportionality Exhibit A).

In *Cooper Industries, supra*, the Supreme Court explained the relevant inquiry for determining whether a punitive damage award violates the Eighth Amendment. There, the jury also misunderstood the law. *Id.* at 441. The trial court had instructed the jurors that certain conduct was "wrongful," but, in reality, it was "lawful." *Id.* Since the jury may have awarded punitive damages to deter future wrongful conduct, *de novo* review had to consider the impact of this misapprehension of law.[16]

"The integrity of the factfinding process is the heart and soul of our judicial system. Judicial control of the jury's knowledge of the case is fundamental…." *McCray v. State*, 565 So.2d 673, 674 (Ala. 1990). Here, judicial control evaporated when the jury ignored the instructions and speculated that Deandra would be released after serving only 15 years if he were sentenced to life.

Texas has adopted a five-part test to address the breakdown in the process that results when jurors discuss parole during deliberations. To prevail, the defendant must show:

---

[16] Interestingly, on remand, the Ninth Circuit concluded that the jury's punitive damage award violated the Eighth Amendment, and the Court reduced the award by 80%. *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 285 F.3d 1146, 1147-1152 (9th Cir. 2002).

i. a misstatement of law;

ii. asserted as fact;

iii. by one professing to know the law;

iv. which is relied upon by other jurors;

v. who for that reason changed their vote to a harsher punishment.

Buentello v. State, 826 S.W.2d 610, 611 (Tex.Crim.App. 1992), *reaffirming* *Sneed v. State*, 670 S.W.2d 262, 266 (Tex.Crim.App. 1984).

Deandra has established each of these five elements. Juror Waggoner's statement after trial clearly shows that ***some jurors*** asserted that life sentences result in release after 15 years (Proportionality Exhibit A). This patently misstates the law regarding a sentence of "imprisonment for life by the Department of Corrections without eligibility for probation or parole." The jurors making these misstatements asserted them as fact and backed-up their assertions with special, extraneous knowledge of specific examples. They discussed "people they know of where life in prison just lasted 15 years" (Proportionality Exhibit A). Juror Waggoner made clear that most of the jurors, who, until this discussion, had favored a life sentence relied on these misstatements and changed their vote to death. (Proportionality Exhibit A).

Texas recognizes that this type of discussion among jurors is akin to the jury receiving extrajudicial evidence. *Buentello*, 826 S.W.2d at 614. The discussion among Deandra's jurors illustrates this. Jurors asserted knowledge about specific examples of defendants being released after serving only 15 years of a life sentence. Deandra had no means of countering or challenging those facts. He could not confront or cross-examine

the jurors who served as the witness providing that damning evidence. *Id.* at 613. "[A defendant is] denied due process of law when the death sentence [is] imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

This Court recently addressed the presumption of prejudice that stems from the jury receiving extraneous evidence. *Travis v. Stone*, 66 S.W.3d 1, 4-6 (Mo.banc 2002). There, a juror visited the accident scene, but claimed that it had no impact on her deliberations. *Id.* at 3. This Court, nonetheless, "assumed that [the juror's] visit had an impact on her decision making, which in turn influenced her participation in the jury deliberations. This could have subtly affected the outcome of the case, and it would be virtually impossible for anyone to demonstrate the effect of her interactions on the deliberations…." *Id.* at 5; *see also Middleton v. Kansas City Public Service Co.*, 152 S.W.2d 154, 160 (Mo. 1941) (despite affidavits from nine jurors minimizing impact of extraneous evidence, this Court noted that the presumption of prejudice is so strong it can rarely be overcome by assertions of no impact).

Here, the extraneous evidence that a life sentence would mean Deandra would be out there doing the same thing in just 15 years had an enormous impact on the deliberations.

> Most of them who were not sure about the death penalty, it was just whether or not he was going to get out, they didn't want him to get out if they put him in for life. So some of the jurors talked about a few people that had gotten out that had life. That is what took so long.

(Proportionality Exhibit A).

While jurors may not impeach the verdict by testimony or affidavit, they may provide such testimony or affidavit to show that juror misconduct resulted in the jury's consideration of extraneous evidence. *Travis, supra* at 4; *also Middleton, supra* at 160. "[J]urors are competent to testify about improper influences that intrude upon their deliberations." *Sears v. State*, 493 S.E.2d 180, 187 (Ga. 1997). If they were not, there no means would exist to preserve the integrity of the judicial process. After all, jurors cannot have a license to ignore the court's instructions and receive extraneous evidence. Misconduct must be remedied, especially where it created such a misapprehension of the law that most jurors who had been favoring life change their votes to death (Proportionality Exhibit A).

This Court must conduct its own independent review to ensure that Deandra's death sentences carry with them the heightened reliability that is constitutionally required. The arbitrariness of the misconduct that infected his jury's deliberations stripped Deandra's death sentences of any reliability. This Court should commute Deandra's death sentences to sentences of life imprisonment without parole. In the alternative, if this Court concludes it needs findings by the trial court, it should hold Deandra's appeal in abeyance and remand his case for a hearing on juror misconduct. *See State v. Post*, 804 S.W.2d 862, 862-863 (Mo.App., E.D. 1991).

Influence of Passion & Prejudice

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or

emotion." *State v. Taylor*, 944 S.W.2d 925, 937 (Mo. banc 1997), *quoting* *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (additional citations omitted). The need to remove any appearance that death resulted from caprice or emotion, our Legislature mandated that this Court search the record independently and to correct any death sentence infected by emotion. *Taylor, supra*, *citing* §565.035.3(1). In *Taylor*, the prosecutor told jurors to listen to "emotion" and to "get mad." 944 S.W.2d at 938. On appeal, the State sought refuge from this invitation since Taylor's jury had hung on punishment. *Id.* This Court, however, reversed, noting that, but for the passion and prejudice injected by the State, Taylor's jury may well have sentenced Taylor to life without parole. *Id.* The same is true here.

Deandra's jury began hearing the State's evidence against him on March 11, 2002 (Tr. v). Two days later, the State conjured up images of 9/11 while linking Deandra to that devastating tragedy. Meanwhile, the nation had paused to mark the six month anniversary of its worst terror attack. *See Six Months After Sept. 11, America Reflects*, on NPR.org at http://www.npr.org/news/specials/sixmonths/. Governor Pataki recalled that we had seen "the worst of mankind…the face of evil." *See 'Tribute in Light,' bells mark 6-month anniversary* JSOnline, http://www.jsonline.com/news/attack/mar02/26593.asp.

Only six months had passed, and emotions remained high. CBS News fanned those emotions almost two weeks before Deandra's trial with its announced intention to air a documentary including live "graphic footage of the World Trade Center attacks…" FreeRepublic.Com, "A Conservative News Forum," *CBS urged not to show graphic footage in 9/11 film* (2/27/2002) at http://www.freerepublic.com/focus/fr/636867/posts

> At this grim anniversary, NPR News report[ed] on Americans' countless steps toward recovery -- compensating the terror victims and restoring the crash sites, ***resisting anti-Islam backlash*** and replenishing the ranks of firefighters -- and always, remembering those who were lost.

See NPR.org at http://www.npr.org/news/specials/sixmonths/ (emphasis added).

While most Americans resisted fomenting or participating in anti-Islam backlash, the Boone County Prosecutor showed no such compunction. While cross-examining Deandra's expert, Dr. Poch, the Prosecutor attacked Dr. Poch's credibility and opinions (Tr. 2215-2314). He interrupted that attack to end his cross-examination with a bang:

> Q. Okay…Did you -- Now, I guess did you get the record where he indicated, in August of 2001, that ***he was notifying jail personnel that he was changing his religion to that of Muslim***?
>
> A. I think I recall that.
>
> Q. Would his ability to ***keep up with current events*** in any way be impaired as a result of all these problems you say he's got?
>
> A. Not necessarily.
>
> Q. He could read, ***he could know what's going on in the outside world***?
>
> A. Correct.

(Tr. 2315) (emphasis added).

> At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the

jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted.

Viereck v. United States, 318 U.S. 236, 248 (1943). In *Viereck*, the prosecutor invoked the horrors of World War II. Here, the Prosecutor fanned flames fueled by the War on Terrorism. This Court cannot place its imprimatur on such passion and prejudice. Deandra's jury may well have spared his life but for the injection of this highly inflammatory evidence.

The Defendant

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Punishment, then, must "be directly related to the personal culpability of the criminal defendant." *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988); *accord Atkins v. Virginia*, 536 U.S. 304, ___, 122 S.Ct. 2242, 2250-2251 (2002). Consequently, this Court must decide whether the death penalty is excessive given Deandra's moral culpability. §565.035.3(3). It is.

Whether death is an appropriate punishment for Deandra requires more than a rote citation to other cases involving multiple homicides. The question is not whether Deandra's background and mental illnesses excuse his actions, but whether they warrant sparing his life.

Deandra grew up in East St. Louis, Illinois – raised by his maternal grandparents (Tr. 2557, 2597, 2612, 2622). East St. Louis is generously described as "one of the poorest and most deprived [communities] in the state of Illinois and is particularly difficult for raising children" (Tr. 2635). Industry left East St. Louis, leaving the citizens

"unemployed and destitute" (Tr. 2636). For eight years, the city too poor even to pick up its garbage (Tr. 2637). People had to leave their garbage in alleys, vacant lots and abandoned houses, or worse, to get rid of it, they burned it and created a "haze of garbage smell all over the city" (Tr. 2637). Lying below the river level and lacking money to fix its pumps, the city suffered a 2,000,000 gallon sewage back-up that lasted 8 months (Tr. 2637). It even backed up into the schools (Tr. 2638).

When Deandra was about ten years old, his father had invited him on a motorcycle ride (Tr. 2108, 2601, 2624). Deandra was living with his mother's family, and they had not let him go with his father because he had chores to do first (Tr. 2557, 2597, 2601, 2612, 2622). This made him angry, but he stayed home and swept the floor like he was supposed to do (Tr. 2601). About twenty minutes later, someone came running to the door to tell Deandra that his father had been in an accident (Tr. 2108, 2601). Deandra ran out the door and through the neighborhood (Tr. 2108, 2601). He found his father "fatally injured … it was very gory." (Tr. 2108-2109, 2601). Deandra never cried, he bottled up this tragedy only to suffer flashbacks to it that still cause him pain and distress (Tr. 2109-2110, 2602). He has Post-traumatic Stress Disorder (Tr. 2142-2145, 2191-2195).

Deandra falls in the clinical range for Post-traumatic Stress Disorder, Delusional Disorder, Paranoia, Hypomania, Depression and Anxiety (Tr. 2100-2101, 2127, 2133-2134, 2136, 2140-2141, 2188-2189). He suffers severe impairment from PTSD (Tr. 2142-2145), and his paranoia and hypomania scores indicate psychosis (Tr. 2127-2128, 2130, 2132).

"Mental illnesses are brain disorders. Mental illnesses are highly disabling." *See the American Psychiatric Association's* New Federal Investment in Psychiatric Research.[17] "[W]e…know people who are psychotic or delusional may have chemical imbalances. That's why when we treat psychosis we give nerve medication to help them reduce and control the delusions or the psychotic behaviors." (Tr. 2185). But we also know that

> [f]ar too many affected by severe mental illnesses continue to live in the shadows of society without access to treatments and support services so critical to recovery. The physical impact of struggling with one of these disorders, which profoundly disrupts a person's ability to think, feel, and relate to others, is further compounded by the enormous social, economic and policy barriers that impede swift recovery.

National Alliance for the Mentally Ill, *Omnibus Mental Illness Recovery Act (OMIRA) Brochure* at http://www.nami.org/update/omirabroch.html. "Over 50% of people with mental disorders also abuse drugs, and there is widespread belief that many people with mental illness may be attempting to self-medicate." *APA's* New Federal Investment in Psychiatric Research.

Over the years, Deandra also became Cocaine Dependent, and, during periods of intoxication, he has Cocaine-Induced Psychotic Disorder with Delusions (Tr. 2111, 2152-2155). On November 7, Deandra was intoxicated, using cocaine almost continuously for

[17] This document is stored in PDF format on the accompanying CD, or it is available at http://www.psych.org/pub_pol_adv/newfedinvest61402.pdf.

the prior 24 hours (Tr. 2111, 2149). He was dependent on cocaine (Tr. 2186-2187). Rats that become dependent on cocaine "will go to cocaine, eat crack cocaine…rather than eat food, and they'll die" (Tr. 2186).

Deandra became quite suspicious of those he loved the most – i.e., William (his stepfather), Juanita (his aunt) and Angela (his girlfriend). He felt frightened that "[t]hey're out to get me" (Tr. 1466, 1474, 1915-1916) and "they're ganging up on [me]" (Tr. 1489). He killed them after they "circled him up" (Tr. 1915-1916). Deandra told police that these shootings had stemmed from an incident seven years earlier in East St. Louis when he had shot his drug partner in the leg (Tr. 1487). Ever since then, Deandra felt like this partner was out to kill him, and he came to believe that Angela was in cahoots with the partner from East St. Louis (Tr. 1487-1488). When Jerry offered him a ride, he first accepted it, but then became suspicious and shot him (Tr. 1501-1503).

Two weeks later, presumably sober since he had been in jail and drug-free during the interim, Deandra told Dr. Lipman, "[T]here's too many coincidences that show me that people are plotting like my stepfather, my girlfriend and my aunt always ending up meeting at the same place … the doctor's office or the same court date … too many coincidences, they were meeting to plot." (Tr. 2149-2150). A drug-free Deandra still "believed members of his family had been replaced by look-alikes." (Tr. 2150). He asked Dr. Lipman if DNA tests could be conducted on William, Angela and Juanita "to ensure that they were actually the real people…" (Tr. 2150).

The forced sobriety of incarceration did not erase Deandra's delusional thoughts (Tr. 2149, 2184). It did, however, calm him immensely. In jail, Deandra was polite,

respectful and cooperative (Tr. 2576, 2583, 2630). Death is not appropriate for Deandra. He functions well in incarceration. This Court should vacate his death sentences and sentence him to imprisonment for life without parole.

Conclusion

This trial did not produce a fair ascertainment of the truth, thus Deandra M. Buchanan respectfully requests the following relief:

New Trial:	Points I, II, V
New Penalty-Phase:	Points III, IV, VI, VII, IX
LWOP:	Point VIII; Proportionality

Respectfully Submitted,

_____

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains **25,128** words, which does not exceed the **31,000** words allowed for an appellant's brief.
- ✓ The floppy disks filed with this brief contains a copy of this brief. The CompactDiscs filed with this brief contain a complete copy of this brief, its appendix, the trial transcript, as well as complete copies of each authority cited herein. The floppy disks and CDs have been scanned for viruses using a McAfee VirusScan program, which was updated March 2, 2003, according to that program, the disks are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy thereof were mailed, first class, postage prepaid on the **6th** day of **March 2003**, to John M. Morris, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____

Gary E. Brotherton

IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	**No. SC84515**
	)	
	)	
DEANDRA M. BUCHANAN,	)	
	)	
Appellant.	)	

APPENDIX

to

Appellant's Opening Brief

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[18] This Index contains hyperlinks to MS Word files containing each document in this Appendix.

Certificate of Service

A true and correct copy of this Appendix was mailed, first class, postage prepaid on the **6th** day of March 2003, to John M. Morris, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Gary E. Brotherton